The lower courts decision violates prior Precedent of this circuit (fifth) and the U.S. Supreme Court, Article 6 Section 2 of the U.S. Constitution.

Reasons For Granting The Writ

I. The Court's below applied the "Pre Text-Plus" standard and not the Established by Frederick Hart & Co., Inc. V. recordgraph Corp 169 F 2d 580 (3d Cir 1948); United States ex Rel Kolton v Halpern 260 F 2d 590 (3d Cir 1958) United States ex Rel Nobles v Ivey Bros Constru Co; Inc., 191 F. Supp. 383 (D. Del 1961); Jamison v Pennsylvania Salt Mfg. Co ZZ F.R.d 238 (W.D. Pa 1958); bunny Bear, Inc v Dennis Mitchell Industries 139 F. Supp 542 (E.D PA. 1956) Levy v Equitable Life Assur. Society, 18 F. Rd. 164 (E.D. Pa 1955) and St. mary's v Hicks, 1993 Wl 220265 (June 25 1993).

Gilder documentary evidence of Aetna's Procedural Checklist for Performance Appendix for writ certiorari A-20 Aetna response to plaintiff petitioner Gilder request for production of document. Appendix for writ A-31.

Aetna progressive discipline checklist. Appendix for writ A-21, Aetna-written warning address to Debra A. Gilder Petitioner appendix for writ of certiorari A-22, Aetna- Probation warning address to Debra A. Gilder, Appendix for writ of certioriar A-23, Aetna - Disciplinary Process of appellant Gilder Job requirement, Appendix of writ of certiorari A-24, Aetna Termination letter address to Debra A. Gilder, Appendix of writ of certiorari A-25 make clear that in fact Aetna Life Insurance Terminated Debra A. Gilder on May 20, 1987 and did not simply demote her. A trial court could acknowledged that an Issue of fact was created as to how Gilder was terminated. The trial Court never outlined in Gilder ever established a Prima Facie case. If the Fifth Circuit had outlined a new pretext burden beyond that required by Burdine by the Decisions in Hanchey v Energas Co., 925 F. 2d 96 (5 CA 1990) and Bienkowski v American Airlines, Inc 351 F. 2d 1503 (5th Cir 1988) Utilizing this standard and the 1963 Amendment of F.R.A.P, the lower courts found that Gilder evidence of Pre text fell short because the lower court state there is no admissible evidence submitted by

the Petitioner Gilder to show Pre-textual of discriminatory reason or a motivated by the employer Aetna. It is clear that the trial court and the court of appeals measured Gilders evidence of Pretext under the pretest plus standard-meaning that proving Aetna Life Insurance reason legitimate, non-discriminatory reason to be false is not sufficient in spite of Gilder's Prima Facie case. The fifth Circuit's opinion did not acknowledge that it had established a "New Pretext Burden" in hanchey and Bienkowski.

The fifth Circuit and trial court evidence total confusion about (1) The important of a Prima Facie Case and (2) what is required to show Pre Text. This is well demonstrated by the fact that it cited, with approval, the reasoning of the Eight Circuit in St Mary to the effect that establishing the employer's reason to be unworthy of credence" automatically entitled the petitioner claimant Gilder to Judgment. Yet, it ignored the fact Gilder had established a Prima Facie Case and that Gilder evidence Raised Fact Issues about Aetna's Story Being "unworthy of credence". It said that proving unworthy of credence was not enough to show "Pretext" and that the

Pretext evidence must itself evidence of race and sex discriminatory to be a legitimate discriminatory reason. A comment by the court in Hanchey offered a preview of what would later happen to Gilder. The court there attempted to explain using "Burdine.

Such Pretext can be proved either by showing that a discriminatory reason motivated the defendant or by showing that the preferred reason is unworthy of credence. The latter method, however, must extend beyond casting doubt on the reasonableness of the employer's action; otherwise the law would be converted to a "Just Cause" provision for the Gilder evidence. Burdine, and not St. mary's say that after presenting a Prima Facie case, the plaintiff can prevail by showing that Defendant's reasons are unworthy or credence. This was precisely the reason Gilder offered this evidence. The proof of race and sex, fraud as the motive came from the inference created by the Prima Facie case and Gilder other evidence, not from the Pretext evidence itself.

III. The Lower Courts Improperly Drew Inferences In favor of The Motion For Summary Judgment

By presuming that intent motive of Aetna Life Insurance to crate a file on the Petitioner Gilder for a legitimate non discriminatory reason for the petitioner Gilder termination by entering fraudualry documents into petitioner personal file had only unlawful purposes and the lower courts did not follow the clear standard required by this court for evaluating such evidence in connection with a motion for summary judgment as set forth in Frederick Hart & Co., Inc v recordgraph Corp, 169 F 2d 580 (3 d cir, 1948) United States ex rel Kolton v Halperin, 260 F 2d 590 (3d Cir 1958);; United States ex Rel Nobles v Ivey Brosl Constru Co. Inc., 191 F. Supp 383 (D Del 1961) Jamision v Pennsylvania Salt Mfg Co. ZZ F.R. D 238 (W.D. Pa 1958) Bunny Bear Inc. v Dennis Mitchell Industries 139 F. Supp 542 [E.D. PA. 1956] Levy v Equitable Life Assur Society 18 F. Rd. 164 [E.D. PA 1955]. U.S. v Diebold Inc., 369 U.S. 654 82 Sc 993 (1962); Adickes v. S.H. Kress & Co. 398 U.S. 144, 90 S CT 1598 (1970); and Anderson v Liberty Lobby Inc 477 U.S. 242, 106 S. CT 2505 (1986). PG 34

Conclusion

Gilder did show the lower courts admissible evidence which proved legal discrimination, illegal termination which was unlawful under executive order 11246 and 1964 Civil Right Act and 1991 Amended Civil Right Act by the respondent Aetna Life Insurance and Aetna unlawful motives. Gilders attempt to establish pretext by showing that Aetna version was "unworthy of credence" was met with the Pre Text- plus" requirement and "well pleaded" requirement that such evidence is insufficient unless evidence of race, sex discrimination is self contained there in Gilder Prima Facie case evidence created no inference what so ever of discrimination.

The confusion in the lower courts concerning proof of Pre text by a showing that employer's reason is unworthy of credence cause of this court to take jurisdiction in the St mary case, Frederick Hart & Co, Inc v Recordgraph Corp 169 F 2d 580 (3d Cir 1948).

United States ex rel Kolton v Halpern 260 F 2d 590 3d Cir 1958 United States ex Rel nobles v Ivey Bros Const. Co. Inc 191 F. Supp 383 (D Del 1961) Jamison v Pennsylvania Salt Mfg. to attempt to clarify that confusion. Doubt, however, still prevails with regard to the same issue at the summary judgment stage of a discrimination case.

Relying on the statement in Burdine Gilder attempted to prove that Aetna reasons advanced in its motion for summary judgment were "unworthy of credence' but this was held to be insufficient and the standard used was whether or not Gilder's Pretext evidence itself showed "Aetna" discriminatory Intent. Both opinions in St. Mary' acknowledge that the "unworthy of credence test is alive and well at the time of trial if a prima facie case also exists. Logically this test must likewise be applicable at the summary Judgment Stage, or the Trial stage will seldom be reached - as noted by the dissent in St. Mary's.

The instant case affords the court a prompt opportunity to put to rest any doubt by granting this petition or alternatively, by remanding this case to the trial court with instructions that Gilder's Pre text evidence/well pleaded evidence be revaluated under the "Unworthy of credence" Standard, and that on a motion for summary Judgment inference ces drawn from the evidence are to be adverse to the moving party.

Respectfully Submitted;

Debra A Gilder

Debra A. Gilder

Petitioner Pro-Se Appellant Plaintiff

P.O. Box 200691
San Antonio, Texas 78220
(210) 337-1545
(210) 333-2914

Petitioner is a Pro-Se\ No Attorney\ No License to Bar

Sworn to and Subscribed before me on this 29th Day of January 1994.

George E. Howard

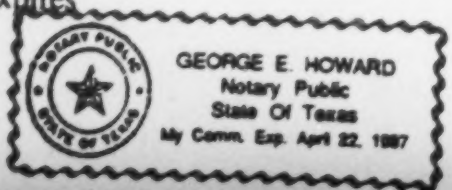
Notary Public In and For the State of Texas

GEORGE E. HOWARD

Printed Name of Notary

April 22, 1997

My Commission Expires



APPENDIX A

FROM THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

THE UNITED STATES COURT OF APPEAL

FOR THE FIFTH CIRCUIT

NO.93-8397

SUMMARY CALENDAR

DEBRA A GILDER,

PLAINTIFF-APPELLANT

V

AETNA LIFE AND CASUALTY

DEFENDANT-APPELLEE.

Appeal from the United States District Court for the Western District of Texas

SA-93-CA-394

Before DAVIS,JONES,and DUHE,Circuit Judges.

PER CURIAM:

After carefully reviewing the parties'briefs on appeal in light of the proceeding in the district court, we are not, persuaded that GILDER presented admissible

evidence--beyond her mere speculation--that AETNA'S legitimate, non-discriminatory reasons for firing her were pretext for illegal discrimination.

As the district court held ,there is no genuine issue of material fact, and summary judgement was correctly granted for AETNA. Further,we see no reversible error in the district court's orders of which appellant complains or otherwise. The charges of fraud make no sense. AFFIRMED.

United States Court Of Appeals Filed Date Nov.17,1993

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled princples of law imposes needless expense on the public and burdens on the legal profession."Pursuant to that Rule, the Court has determined that this opinion should not be published.*

THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

NO. SA-92-CA-394

DEBRA A GILDER,

PLAINTIFF,

VS

AETNA LIFE & CASUALTY

DEFENDANT.

ORDER

On this date came on for consideration by the court defendant Aetna Life & Casualty's first and second post-discovery motions for summary judgment,plaintiff's responses thereto ,as well as the entire record. Plaintiff Gilder's Title VII complainst alleges that defendant discriminated against her because of her race and sex when defendant terminated her employment on May 20, 1987.

Plaintiff's complaint also alleges that defendant violated Executive Order 11246. Plaintiff seeks back pay, insurance and retirement benefits, and ten million dollars for extreme mental anguish.

Defendant moves to dismiss plaintiff's claims of race and sex discrimination as barred by limitations. Defendant also asserts that plaintiff's " Executive Order No 11246" allegation should be dismissed because it affords no private right of action for individual plaintiffs. Defendant alternatively argues that it is entitled to summary judgment on the merits of plaintiff's TITLE VII cause of action

---

The Court hereby GRANTS plaintiff's motion for leave to file briefs in excess of twenty pages (docket no 129) .

Executive Order 11246 affords no private right of action for individual plaintiff. Utley v. Varian Associates,Inc.,811 F .2d 1279,1285 and n. 4 (9th cir.) cert. denied 484 U.S. 824,108 S.CT 89,98 L.ED.2d 50 (1987) The Fifth Circuit has found no private cause of action under the predecessor order to Executive Order No. 11246. Farkas v. Texas Instruments,Inc., 375 F .2d 629,632-3 (5th cir.) cert. denied 389 U.S. 977,88 S CT. 480,19 L. Ed.2d 471 (1967). Accordingly, the plaintiff's claim that defendant Aetna violated the Executive Order is hereby DISMISSED. See Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486, 1532 (M.D. Fla. 1991). The Court will now focus on plaintiff's remaining race and sex discrimination claims.

SUMMARY JUDGMENT STANDARDS

Rule 56(b), Fed.R.Civ.P., provides that a defending party may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor. Summary judgment

shall be rendered if the pleadings, depositions, andwers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), Fed.R.Civ.P. When a motion for summary judgment is made and supported, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial; if he does not so respond, summary judgment, if appropriate, shall be entered against him. Rule 56(e), Fed.R.Civ.P.A party seeking summary judgment bears the initial burden of informing the Court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v Catrett, 477 U.S. 371, 323, 106, S.Ct. 2548, 91 L.Ed. 2d 265 (1986).

However, there is no requirement that the moving party support its motion with evidentiary materials negating the opponent's claim. Id. Regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the Court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. Id.,at322-323, 106 S.Ct. at 2552-53. The party opposing a motion must present affirmative evidence in order to defeat a properly supported motion for summary judgment. Anderson v Liberty Lobby, Inc., 477 U.S. 242, 257, 106 S.Ct.2505, 2514, 91 L.Ed.2d 202 (1986). Summary judgment may be appropriate even if there is some metaphysical doubt as to the material facts. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986); See Spiller v. Ella Smithers Geriatric Center, 919 F.2d 339, (5th Cir. 1990).

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Anderson, 477 U.S. at 247-248, 106 S.Ct. at 2510. The dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving pary. Id.

Summary judgment is proper if, under the governing law including consideration of the substantive evidentiary standards, there is only one reasonable conclusion as to the verdict, but not if reasonable minds could differ as to the import of the evidence. Id., at 250-251, 255, 106 S.Ct. at 2511, 2514. Summary judgment, although a useful device, must be employed cautiously because it is a final adjudication on the merits. The Court must, therefore, draw all reasonable inferences most favorable to the party opposing the motion. Id.

LIMITATIONS

Defendant contends that after plaintiff's May 20, 1987 termination, she filed a timely charge of race discrimination which was duly investigated. Defendant asserts that plaintiff's subsequent sex discrimination allegation was imcluded in the determination. Defendant argues that plaintiff did not timely bring the instant lawsuit until over three years after the November 16, 1988, right to sue letter encompassing both the sex and race claims was issued. Plaintiff asserts that she did not receive the November, 1988 right to sue letter; that she had no control over the government agencies processing her claims; and that she actually received a right to sue letter issued March 19, 1992.

After reviewing the summary judgment evidence, the Court finds that plaintiff Gilder was terminated from her employment as a Field Claim Examiner with Aetna on May 20, 1987, she filed

a charge of race discrimination which was assigned No.360-87-0914. See Def. First S/J, Exh. A While plaintiff's EEOC race discrimination charge was pending, plaintiff wrote a October 7, 1987 letter to Alonzo Meggett of the United States Department of Labor complaining that she had been terminated due to her race and sex. The letter was received by the Department of Labor on November 13, 1987 See Def. First S/J, Exhs. D and E. Though the letter mentions sex discrimination, plaintiff primarily complains of disparate treatment due to race. Id.

The Department of Labor's investigation based on plaintiff's complaint resulted in a finding of insufficient evidence to conclude that defendanthad violated Executive Order 11246. See Def. First S/J, Exh. F*. plaintiff's subsequent appeal resulted in a finding that defendant did not violate its nondiscrimination and affirmative action obligations under Executive Order 11246.See Def. First S/J, Exh.G.

** Plaintiff Gilder claims that Exhibit F is a fraud copy of the investigation results.*

On February 19, 1988, the EEOC sent a notice to defendant Aetna that plaintiff Gilder had filed a charge based on race and sex that has been initially processed by the Department of Labor. See Def. First S/J, Exh. H. The notice indicated that No. 360 88 0628 was assigned to the charge and that defendant need do nothing in response to the charge. Id.

On June 7, 1988, the EEOC decided that the investigation did not disclose any evidence that plaintiff's race was a factor in her discharge. See Def. First S/J, Exh. B. Following plaintiff's appeal, the EEOC reviewed the investigation of the charge and all supplemental information furnished. See Def. First S/J, Exh. C. On November 16, 1988, the final determination and notice of right to sue was issued referencing Charge No. 360 87 0914. Id.

The EEOC issued another Notice of Right to Sue Letter on March 18, 1992, referencing Charge No. 360 88 0628. See Complaint (docket no. 1), first attachment. This lawsuit was filed on April 13, 1992.

A civil action must be brought within ninety days of receipt of a right to sue letter from the EEOC. See Title 42 U.S.C. s 2000e-5(f); Berry v. Cigna/RSI-Cigna, 975 F.2d 1188, 1191 (5th Cir. 1992). In this case, the EEOC issued Notices of Right to Sue on November 16, 1988 and March 18,1992.

Plaintiff argues that she never received the earlier November 16, 1988 right to sue letter because it was not addressed to her and was not sent certified mail. At her deposition, she could not recall whether she had seen it. See Def. First S/J, Exh. I, pg. 166.

Whether plaintiff received the November, 1988 right to sue letter and why the EEOC issued the March 18,1992 right to sue letter constitute genuine issues of material fact.

Drawing all inferences in favor of plaintiff Gilder, this Court cannot comfortably conclude that plaintiff's complaint is time-barred. The Court will therefore assume that the complaint is timely filed.

TITLE VII ALLEGATIONS

Defendant further argues that summary judgment is appropriate because plaintiff's race and sex allegations are not supported by the record. Defendant contends that plaintiff does not meet her prima facie burden of establishing that she is qualified for her position or that she was replaced by a minority. Defendant asserts that legitimate, nondiscriminatory reasons existed for plaintiff's discharge. Plaintiff complains about the standards that were set for employees and the progressive discipline that she received. She also asserts that she eas not discharged for legitimate business reasons.

In passing Title VII, Congress announced that "sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."
Price Waterhouse v. Hopkins, 490 U.S. 288, 109 S.Ct. 1775, 1784, 104 L.Ed.2d 268 (1989). In a typical disparate treatment discharge case, the plaintiff must prove a prima facie case of discrimination by showing that (1) plaintiff is a member of a protected group; (2) plaintiff was qualified for the job that was held; (3) plaintiff was discharged; and (4) after plaintiff's discharge, the employee filled the position with a person who is not a member of a protected group.

Vaughn v. Edel, 918 F.2d 517, 521 (5th Cir. 1990). Of course, the specification of the prima facie proof required may differ according to the fact situation. Id. at 521, n.4; See also Frazier v. Garrison I.S.D., 980 F.2d 1514, 1526 (5th Cir. 1993).

Once a prima facie case is established, the defendant must articulate a legitimate, nondiscriminatory reason for the termination. If the defendant articulates such a reason, the plaintiff must then show by a preponderance of the evidence that the reasons for termination are pretextual. Vaughn, 918 F.2d at 521. Plaintiff may show pretext by persuading the Court that a discriminatory reason more likely motivated the employer or by showing that the employer's proffered explanation is unworthy of credence. Little v. Republic Refining Co., Ltd., 924 F.2d 93, 96 (5th Cir. 1991) citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248,256, 101 S.Ct. 1089, 1095, 67 L.Ed. 2d 207(1981)

Ultimately, the plaintiff must prove that she was discriminated against because of her race or sex. See Valdez v. San Antonio Chamber of Commerce, 974 F.2d 592, 596 (5th Cir. 1992).

After reviewing the summary judgment evidence, the Court finds that black female Debra Gilder was initially hired by defendant Aetna in September, 1981. By June 1985, plaintiff had been promoted to Field Claim Examiner, Class 24. Her elevation to Field Claim Examiner was her fifth promotion in five years with the company, and indicates that she was minimally qualified for her position. See Def. Second S/J, pg.2.

A Field Claim Examiner paid claims under Aetna's various benefit plans. The position description lists the job's two objective measures of performance as quality and average daily production. See Def. Second S/J., Exh. D. Defendant's home office set forth certain minimum standards of performance (MSP). See Def. Second S/J, Exhs. E and F. Employees were rated according to the standards set by the MSP.

The summary judgment evidence indicates that plaintiff was formally disciplined for poor quality in late 1985 and late 1986.

The verbal warning was extended on November 12, 1985 and plaintiff was placed on written warning on January 10, 1986. After she showed improvement, plaintiff was removed from written warning on February 10, 1986. See Def. Second S/J, Exh. G.

Satisfactory performance continued until plaintiff's quality results failed to meet requirements in September and November, 1986. Plaintiff was again placed on verbal warning on November 11, 1986. See Def. Second S/J, Exh. H.

Plaintiff's three month average of weighted claims per day for December, 1986 through February 1987 did not meet standards and resulted in a Written Warning on March 13, 1987. See Def. Second S/J Exh. K. Plaintiff's difficulties continued. In April 1987 defendant lowered plaintiff's production goals; placed her on probation; and explicitly warned her that failure to meet probation terms may result in termination. See Def. Second S/J, Exhs. L and M.

On May 20, 1987, after plaintiff had failed to meet the reduced production goals mandater by her probation, defendant Aetna terminated plaintiff's employment. See Def. Second S/J, Exh. N. Defendant also notes that similarly situated nonblack and male employees have been disciplined and discharged less serious performance deficiencies. See Def. Second S/J, Exh. O. The Department of Labor analysis, affidavits from supervisors, and statistical breakdown of hirings and terminations indicate that defendant did not engage in discriminatory conduct. See Def. Second S/J, Exh. C; Exh. P; Exh. Q.

After reviewing the summary judgment evidence, the Court finds that while plaintiff subjectively believes that she has been discriminated against*, the record indicates otherwise. Defendant has articulated legitimate, non-discriminatory reasons for terminating plaintiff Gilder in May, 1987. The Court finds

no genuine issues of material fact which preclude the granting of summary judgment in this matter.

Accordingly, the Court hereby DENIES defendant's first postdiscovery motion for summary judgment. The Court hereby GRANTS defendant's second post-discovery motion for summary judgment and hereby DENIES plaintiff's Title VII race and sex discrimination claims. Plaintiff's claim that defendant Aetna violated Executive Order 11246 is hereby DISMISSED.

---

*The isolated conflict with manager John Ruff in the record does not appear sufficiently connected to the decision to terminate plaintiff. See Def. Second S/J, Exh. R, pg. 77-78.

Cost of court are hereby assessed against plaintiff. In view of the circumstances, the Court in its discretion declines to award attorneys' fees to defendant. The district clerk shall immediately issue the final judgment in this matter. This order was dated the 6th day May, 1993,and was signed by **H.F.GARCIA**.

IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

IN RE

NO. 93-8397

DEBRA A. GILDER,

PLAINTIFF-APPELLANT,

VS

AETNA LIFE AND CASUALTY,

DEFENDANT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO D.C. NO. SA-92-CV-394

APPELLANT'S GILDER PETITION FOR SUGGESTION OF REHEARING EN BANC

DEBRA A. GILDER

Pro-Se/Plaintiff/Appellant

P.O. Box 200691

San Antonio, Texas 78220

(210) 337-1545

(210) 333-2914

IN THE UNITED STATES COURT OF APPEALS

IN RE

NO. 93-8397

DEBRA A. GILDER,

PLAINTIFF-APPELLANT,

VS.

AETNA LIFE AND CASUALTY,

DEFENDANT-APPELLEE

Certificate of Interested Persons

The Undersigned Counsel of record certifies that the following listed persons have interest in the out come of this CASE, whether represented by counsel or not as defined in the Local Rule F.R.A.P. 28.2, 1

Debra A. Gilder
P.O. Box 200691
San Antonio, TX 78220
(210) 337-1545
(210) 333-2914

Fulbright & Jaworski
300 Convent St Suite 2200
Inter First Plaza
San Antonion, TX 78205
(210) 224-5575

Appellee Counsel for Defendant Aetna Life & Casualty
W. Wendell Hall

U.S. Department of Justice
United States Attorney's office
Ronald F. Ederes
John F. Paniszczyn
727 E. Durango Blvd A-601
San Antonio, Texas 78206

Counsel for the United States Labor Department

Statement of Counsel/Pro-Se Gilder

I express a belief, based on a reasoned and studied professional Judgment, that the panel decision is contrary to the following decision(s) of the United States court of appeals for the Fifth Circuit [or the supreme of the United States and, Third Circuit].court

1. Frederick Hart & Co., Inc v record graph Corp., 169 F 2d 580 (3rd Cir: 1943;

2. United States Ex Rel. Kolton v Halpern, 260 F. 2d 590 (3d Cir; 1958);

I express a belief, based on the reasoned and studied professional judgment that this appeal involves one or more questions of exceptional importance:

1. Whether the court erred in not applying the correct procedural under rule 56 and the amendment of 1963 for summary judgment, on order dated 11-17-93 [Exhibit A] appendix filed with Enbanc.

2. Where the court of appeal erred in not applying rule 60(b) of the Fed R. Civ P. in the appellant Gilder appeal and all of the orders in the appellant Gilder record excerpts presented to the court of appeal.

3. Whether the court of appeal erred in not applying Rule 28 1292(b) U.S.C.A. in Appellant Gilder appeal and all of the orders in the Gilder record excerpts.

4. Whether the court of appeal erred in not applying Rule 52b U.S. C.A. on all the orders presented by the appellant Gilder in her record excepts filed into the United State court of appeal of Fifth Circuit.

5. Whether the court of appeal erred in nor sending the appellant Gilder appeal thru to the staff attorney office for review, preparation of memorandum of merits of the case on all motions. Exhibit I appendix file enbanc.

6. Whether the court of appeal erred in not reviewing the appellant Gilder appeal under legal conclusion on a De novo Basis Appellant Gilder excepts briefs and record filed in court of appeal.

7. Whether the court of appeal erred in not addressing the appellant Gilder Briefs and record excerpts on mix questions of Law and fact finding in part that are clearly erroneous and application of wrong legal standards briefs and record excepts filed in court of appeal of appellant Gilder.

8. Whether the court of appeal erred in reviewing the defendants appellee briefs when their attorney Cyndi Benedict did not file a appearance in to the court of appeal. [court of appeal docket sheet exhibit E].

9. Whether the court of appeal erred in extending the defendants appellee Aetna time for filing their briefs when their attorney Cyndi Benedict did not file a appearance and did not file a motion into the court under F.R.A.P 27.4 [court of appeal docket sheet exhibit E, D].

10. Whether the court erred in allowing the defendant appellee Aetna attorney to file a late appearance filed 9-16-93 when the appellant Gilder appeal were filed June 18, 1993 [court of appeal docket sheet exhibit E] page 2.

11. Whether the court of appeal erred in allowing the defendant Aetna Life insurance appellee to file their briefs late (appellee briefs filed 9-23-93) and their extension were to 9-22- 93 [court of appeal docket sheet exhibit E] page 2.

12. Whether the court of appeal erred in not addressing the issue whether the appellant Gilder proved a prima face case in the United State District Court under case No D.C. SA-92-CV- 0394. [Page 5 of the appellant Gilder briefs filed in to the court of appeal Aug 2, 1993 see docket exhibit].

13. Whether the court of appeal erred in not stating the finding of facts and conclusion of law on orders issued 11-17-93 [Exhibits A, F appendix filed with En Banc rehearing].

14. Whether the court of appeal erred in not setting forth separate documents when the judgment were enter in appellant Gilder appeal on order 11-17-93 [Exhibit A, F appendix file with Enbanc rehearing].

15. Whether the court of appeal erred in not issuing a order stating that appellant Gilder pay the defendant appellee. Aetna the cost on appeal. [Exhibits C appendix file with Enbanc].

16. Whether the court of appeal erred on order dated 11-17- 93 denying no reversal of the district court ruling of summary judgment stating the appellant Gilder submitted no admissible evidence when clerks office stated no appendix were necessary when filing the appellant briefs and record excerpt. [Exhibit A appendix file with the Enbanc rehearing.

17. Whether the court of appeal erred in using the wrong opinion in its judgment on order issue 11-17-93 instead of following U.S.C.A. 47.6 and U.S.C.A. 47.5.3 exhibit A appendix file with Enbanc rehearing.

18. Whether the court erred in not considering that the appellee Aetna attorneys fail to follow the laws or make some misrepresentation of the facts that their attorneys are following the Law then it becomes fraudently [District Court Docket Sheet 64, 60, 67].

19. Whether the court of appeal erred on order date 11-17- 93 when judgment were entered that whether the appellee Aetna's attorneys cohort or whether Aetna attorney misrepresentation of the material facts during pre trial matters and discovery by the following stating that she and her friend were going to fix this lawsuit. Docket court docket sheet 64, 60, 67 and appellant briefs page 2, 3.

20. Whether the court erred in allowing Aetna appellee to created the attach file in order to support their non- discriminatory reason against the appellant Gilder.

21. Whether the court erred in not questioning the authentication of the appellee Aetna Document to be valid on invalid.

22. Whether the court of appeal erred in not reviewing the document issued by Aetna appellee setting the appellant Gilder were put on warning 4-20-87 on whether Aetna created this document in order to get out of their non-discriminatory reason and illegal discrimination. Which would make Aetna moody for illegal discrimination invalid Exhibit 4 file in D.C. under Docket Sheet 131.

23. Whether the court of appeal clerk office erred in handing the appellant Gilder appeal when under Rule 27 the staff attorney office were to handle Pro Se motions, probable cause, motion for appointment of counsel, etc memorandum on the merits of the case when all briefs are filed appendix I file with En Banc rehearing.

24. Whether the court of appeal erred in it conclusion on not revising the district court decision of summary judgment is clearly erroneous for realizing on a fraudenty document, exhibit Y of summary judgment response of appellant Gilder Number 131. D.C. Docket Sheet

25. Whether the court of appeal erred in not reviewing the appellant Gilder response to part one and part two to the defendants appellee Aetna Briefs in support of summary judgment under the district court transcripts docket sheet 125, 130, 131.

26. Whether the court erred in not reviewing document exhibit U which has Brenda Riffle a employee of Aetna performance appraisal and exhibit z of the appellant Gilder response to part two of the defendant appellant brief in support of summary judgement, which has Debra Brehm performance appraisal as evidence that

Aetna didn't put these white employee on any discipline action for failing to meet either production or poor performance. Aetna did not terminate these whit employee like they did the appellant Gilder. [Filed in the District court Docket Sheet 131].

27. Whether the court erred in not reviewing the appellant Gilder appeal and orders which there is substantial ground for difference of opinion and such order involves controlling question of Law when District Court denied the appellant Gilder of a Interlocutory Appeal or order file by D.C. Docket sheet 102.

28. Whether the court erred in not reviewing the appellant Gilder appeal and orders D..C. Docket sheet 2, 49, 70, 113, 61 for a court appointed counsel, which there is substantial ground for difference of opinion and such orders involves controlling questions of law.

29. Whether the court erred in not reviewing the appellant Gilder appeal and orders from district court docket sheet # 8, 11, 87,99, 103 and 122 which there is substantial grounds for difference of opinion and such orders involves controlling question of law.

30. Whether the court erred in not reviewing the appellant Gilder appeal and orders in the record excerpt of appellant Gilder on the District court Affirming Orders of Magistrate appeal (Docket sheet 65, 67, 68, 70, 71 appellant Gilder responses to order 64, 66, 67) which there is substantial grounds for difference of opinion and such orders involves controlling questions of law.

31. Whether the court of appeal erred in not reviewing order file with district court docket sheet 125 allowing the appellee Aetna attorneys to Barger the appellant Gilder witness before trial when Aetna did not submit a witness list into the district court and discovery had expired.

32. Whether the court deprived the Plaintiff-Appellant's Gilder of due processing in the appellant Gilder appeal.

Table Of Contents

Certificate of Interested Persons.....-i-

Statement of Counsel..ii, iii, iv, v, vi, vii, viii,ix,x,xi,xii,xiii

Table of Contents.....xiv

Argument of Authorities.....

Table of Citations..... ..

Statutes.....

Preliminary Statement.....1

Statement of Issues.....2

Certificate of Service.....

I. The panel erred in allowing the Defendant Appellee Aetna Attorney to file without a appearance, which substantial Impaired the Appellants Right and materially effected the out come of the case and appellant and appeal.

II. The panel erred in allowing the Appellee Aetna attorney a extension of time by telephone and not comply to U.S.C.A Rule 27.4 which substantially Impaired the appellant Gilder Rights and materially effected the outcome of the case and appellant appeal.

III. The panel erred in reviewing the appellee Aetna...Briefs when they were filed untimely even after the court granted the appellee Aetna extension of filing their, which substantially impaired the appellant Gilder rights and materially effected the out come of the case appeal.

IV. The Panel erred in allowing the appellee Aetna attorney to file a late attorney appearance which substantially impaired the appellant Gilder rights and materially effected the outcome of the case and appeal.

V. The panel erred in not addressing all issues put before the court in the appellant Gilder appeal which substantially impaired the appellant Gilder rights and materially effected the out come of the case and appellant appeal.

VI. The panel erred in applying the procedural under rule 56 and the amendment of 1963 for summary judgment which substantially impaired the appellant Gilder rights and materially effected the out come of the case and appeal.

VII. Whether the court erred in not sending the appellant Gilder motions, pleads, briefs through to the office of staff attorney since appellant is a Pro-Se which substantially impaired the appellant Gilder rights and materially effected the out come of the case and appeal Exhibit I Appendix

Table of Citations

Frederick Hart & Co., Inc v Recordgraph Corp...
169 F 2d 580 (3d Cir 1948)

United States Ex Rel. Kollow v Halpern.....
260 F. 2d 590 (3rd Cir 1958);

Supreme Court, U.S.
FILED

93 1732 FEB - 4 1994

OFFICE OF THE CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1993 TERM

DEBRA A. GILDER,

PETITIONER

V.

AETNA LIFE & CASUALTY

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO

THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DEBRAA A. GILDER

P.O. BOX 200691

SAN ANTONIO, TEXAS 78220

(210) 337-1545

(210) 333-2914

180 pp

Questions Presented

I. Whether a Discrimination claimant can Defeat an Employer's motion for Summary Judgment by: (1) Establishing a Prima Facie case (under McDonnell-Douglas V. Green., Frederick Hart & Co., Inc. v. Record graph Corp., 169 F. 2d 58. (3d Cir: 1948); United States Ex Rel. Kolton v Halpern, 260 F. 2d 590 (3d Cir. 1958); United States Ex rel. Nobles v. Ivey Bros. Constr. Co., Inc., 91 F. Supp. 383 (D. Del. 196 D; Jamison v Pennsylvania Salt mfg. Co., 22 F.R.D. 238 (W.D. Pa 1958); Bunny Bear, Inc V Dennis Mitchell Industries 139 F. Supp 542 (E. D. Pa. 1956); Levy V Equitable Life Assur. Society, 18 F.R.D. 164 (E.D. Pa. 1955).

II. Whether A. Discrimination claimant can Defeat an Employer's motion for Summary Judgment by the adverse party, In opposing the Motion does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial, rests on averments of the claimant pleading which on their face present an issue to Deny a summary judgment if the averments are "well-pleaded" and not supposititious conclusory, or ultimate.

Questions Presented

III. Whether a discrimination claimant case involves principles the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the courts of appeal and lower courts.

IV. Whether a Discrimination claimant case may justify "special and important reason" imply a reach to a problem beyond the academic or the Episodic: where the issues involved reach constitutional dimensions, for then there comes into play regard for the court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. Rice v Sioux City Memorial Park cemetery, 349 us 70, 99L Ed. 897, 75 Sct 614.

V. Whether a discrimination claimant case can be determine under Rule 19 (Predecessor to Rule 10) embodies the criteria, developed ever since the averts Act of 1891, by which the court determines whether a particular case merits consideration, with due

regard to the proper functioning of the Limited Reviewing power to which the court in confined, decisively restricted through the creation of the intermediate court of appeals and more largely confined by the Judiciary Act of 1925. Rice v Sioux City Memorial Park Cemetery 349 US 70, 99 L Ed 897, 75 Sct 614.

VI. Whether a discrimination claimant case may be determined on mix questions of law and fact finding in part that are clearly erroneous and application of wrong legal standards to defeat and employer motion for summary judgment.

VII. Whether a discrimination claimant case may be reviewed under legal conclusion on a De Novo Basis which can defeat an Employer motion for summary judgment.

VIII. Whether a discrimination claimant case requires the supreme court to address the nature of the evidentiary burden placed upon the petitioner-plaintiff appellant in an employment discrimination suit brought under Title IX... The narrow question presented is whether, after the Petitioner-plaintiff appellant has provided a Prima-Facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate non- discriminatory reasons for the challenged employment action existed, Texas Department of Community Affairs v Burdin 450 U.S. 248, 25 Fed 113 (1981).

IX. Whether a discrimination claimant case required the Supreme Court to address under Rule 52(a) the lower courts Trial Court in non-jury actions, which includes actions in which the jury's function is only advisory, shall find the facts specially and state separately its conclusions of law there on "when the trial courts/lower courts decisions turn in part and estoppel by Judgment and as an aid to the appellate court on review.

Questions Presented

X. Whether a discrimination claimant case comply with Rule 52(a) where the lower courts finding in employment discrimination suit failed to cover all material issues raised by discrimination charge and did not reveal factual basis for Ultimate Finding of no discrimination.

XI. Whether a discrimination claimant case creates the right to a Jury Trial under Title VII of the Civil Right Act of 1964/The Civil Right Act of 1991.

XII. Whether a discrimination claimant case creates and allows recovery of compensatory and punitive damages and that the CRA specifically provides that the limitation on compensatory and punitive damages in Title VII actions is not applicable under section 1981, and that nothing in the CRA is to be construed as limiting the Scope of or the Relief Available under, Section 1981. Wards Cove Packing Co. v Atonio.

Questions Presented

XIII. Whether the Lower courts improperly drew inferences in favor of the motion for summary judgment.

XIV. Whether the Lower Courts improperly drew inferences where the unsuccessful party petitioner Gilder has been prevented from exhibiting fully her case, by Fraud or deception on her by the opponent respondent Aetna Life Insurance to Improperly Drew inference in favor of the motion to affirm the summary judgment and not even look at the Fraud in Petitioner Gilder discrimination case.

In The Supreme Court Of The United States

DEBRA A. GILDER

Petitioner-Plaintiff-Appellant

vs

AETNA LIFE & CASUALTY

Respondents-Defendant-Appellee

Certificate Of Interested Persons

List Of Parties To The Proceedings

The undersigned Counsel of record certifies that the following listed persons have interest in the out come of this case whether represented by Counsel or not as defined in the Local Rule F.R.A.P. 28.2,1

DEBRA A. GILDER
P.O. BOX 200691
SAN ANTONIO, TX 78220
(210)337-1545
(210) 333-2914

U.S. DEPARTMENT OF JUSTICE
U.S. ATTORNEY'S OFFICE
RONALD F. EDERES
JOHN F. PANISZCYN
727 E. DURANGO BLVD.
A-601, SAT 78206

FULBRIGHT & JAWORSKI
300 CONVENT ST. SUITE 2200
INTER FIRST PLAZA
SAN ANTONIO, TX 78205
(210) 224-5575

Respondents-Appellee-Defendant
AETNA LIFE INSURANCE
COUNSEL
W. WENDELL HALL

Table of Authorities

Case Page

Frederick Hart & Co... Inc v Recordgraph Corp.....

169 f 2d 580 (3d Cir 1948)

United States Ex Rel. Kolton v Halpern.....

260 F. 2d 590 (3rd Cir 1958

United States Ex Rel Nobles v Ivey Bros Contr. Co; Inc..

191 F Supp 383 LD Del 1961

Jamison v Pennsylvania Salt Mfg Co., 22 F.R.D. .....

238 (W.D. PA 1958)

Bunny Bear, Inc v Dennis Mitchell Industries .....

139 F Supp 542 (E.O. PA 1956;

Table of Authorities

Case Page

Levy v Equitable Life Assur Society .....

542 [E.D. PA 1956]

Levy v Equitable Life Assur Society .....

18 F.R.D. 164 (E.D.P.A. 1955)

Texas Dept of Community Affairs v Burdine, 450

U.S. 248, 101 S. Ct 1089 (1981) .....

Rice v Sioux City Memorial Park Cemetery

349 U.S. 70, 99, L Ed 897, 75 S CT 614 .....

Appendix

Page

Opinion of Court of Appeals.....A-1

Opinion of District Court.....A-2

Petitioner Petition for En Banc Rehearing.....A-3

Order Denying Motion for Rehearing.....A-4

Petitioner Motion for Reconsideration of Rehearing En Banc.....A-5

Order Denying Motion for Reconsideration of Rehearing En Banc.....A-6

Judgment Order Issue 11-17-93 by the Court of Appeal of Fifth Circuit (Appendix to Motion for Petition for Rehearing En Banc [Exhibit A]... .....A-7

United States court of Appeal Fifth Circuit Office of Clerk Letter Dated 6-24-93 [Exhibit B] Appendix motion for Petition for rehearing En Banc. A-8

Appendix

Page

United States Court of Appeal Fifth Circuit office of Clerk. Letter dated ll-17-93 Appendix to motion for Petition for Suggestion of Rehearing En Banc [Exhibit C].....A-9

Letter from Appellee Aetna Attorney Cyndi M. Benedit dated 8-13-93 [Exhibit D Appendix of Rehearing En Banc].....A-10

United States Court of Appeal Fifth Circuit Docket Sheet [Exhibit E Appendix Petition for Rehearing En Banc].....A-11

United States Court of Appeals for Fifth Circuit or Deny Default Judgment [Exhibit F appendix Petition for suggestion for rehearing En Banc].....A-12

Appendix

Page

Letter from Aetna Attorneys, Dated 9-8-93 Late Appearance. Appendix Exhibit G of the Petition for suggestion of rehearing En Banc of Appellant Gilder.... A-13

F.R.A.P. Local Rules 27 all of the Rules containing to the Internal operation Procedure of the U.S. court of Appeal Clerk Offices [Exhibit H Appendix Petition for suggestion Rehearing En Banc of Appellant Gilder].....A-14

F.R.A.P. Local Rules 27 Rule on Internal operating procedure of the U.S. Court of Appeal Handling of Pro-Se motions and processing of all Brief of the Pro-Se [Exhibit I Appendix of Suggestion of Rehearing En Banc Appellant Gilder].....A-15

F.R.A.P. 47.6 and 47.5.3 of the United States Court of appeal of the Fifth Circuit [Exhibit J of Appendix Rehearing Petition of En Banc].....A-16

Appendix

Page

The 1963 Amendment of the Fed. R. Civ. P.
In opposing the motion of Summary Judgment
[Exhibit K of the rehearing Appendix En BANC]..... A-17

F.R.A.P. 46.2 Entry of Appearance of Attorneys
into the United States Court of Appeal of the
Fifth Circuit [Exhibit L of the Appendix of the
Petition of Suggestion for rehearing En Banc].....A-18

Defendant Aetna Action of the Appellant Gilder
Employment history [Exhibit M of the appendix of
the petition of suggestion for rehearing En Banc
Appellant Gilder].....A-19

Defendant Aetna Response to Plaintiff request for
production of Document [Exhibit O petition for
rehearing En Banc.....A-31

Appendix

Page

The 1963 Amendment of the Fed. R. Civ. P.

In opposing the motion of Summary Judgment

[Exhibit K of the rehearing Appendix En BANC]..... A-17

F.R.A.P. 46.2 Entry of Appearance of Attorneys

into the United States Court of Appeal of the

Fifth Circuit [Exhibit L of the Appendix of the

Petition of Suggestion for Rehearing En Banc].....A-18

Defendant Aetna Action of the Appellant Gilder

Employment history [Exhibit M of the appendix of

the petition of suggestion for rehearing En Banc

Appellant Gilder].....A-19

Defendant Aetna Response to Plaintiff request for

production of Document [Exhibit O petition for

rehearing En Banc.....A-31

Appendix

Page

Procedural Checklist for Performance Exhibit N of appendix for rehearing Petition of En Banc of appellant Gilder.....A-20

Aetna Progressive Discipline Checklist [Exhibit P of the Appendix for rehearing En Banc of appellant Gilder]..... A-21

Aetna-written warning address to Debra A. Gilder [Exhibit Q of the Appendix for rehearing En Banc of Appellant Gilder]..... A-22

Aetna - Probation warning address to Debra A. Gilder [Exhibit R of the appendix for rehearing En Banc of appellant Gilder]..... A-23

Aetna - Disciplinary Process of appellant Gilder Job Requirement. [Exhibit S of the appendix for rehearing En Banc of the appellant Gilder]..... A-24

Appendix

Page

Aetna - Termination letter address to Debra A. Gilder [Exhibit T of the appendix for rehearing En Banc of the Appellant Gilder]..... A-25

Standards of Proof [Exhibits U of appendix of En Banc]

Statues..... A-32

28 U.S.C.A. 1292(b).....

42 U.S.C. 2000e Title VII.....

Article 6 Section 2 of the Constitution of U.S.... A-26

Amendment V to the United States Constitution... A-27

Amendment VII to the United States Constitution.... A-28

Amendment IX to the United States Constitution..... A-29

Amendment XI to the United States Constitution..... A-30

1963 Amendment of F.R.A.P..... A-17

NO._____

In The Supreme Court of the United States

Debra A. Gilder
Petitioner Plaintiff Appellant
vs Pro-Se

Aetna Life & Casualty
Respondents Defendant Appellee

Petition for Write of Certiorari to The United States Court of Appeals For the Fifth Circuit

---

Opinions Below

The Opinion of the Court of Appeal is reported at 990 F. 2d (5th Cir. 1993) and is reproduced in the Appendix at Page A-1. The Opinion of the District Court is Reported at 802 F. Supp. 1468 (N.D. Tex 1992) and is reproduced in the Appendix at Page A-2.

Jurisdiction

The Judgment of the Court of appeals was entered on 11-17-93. Petitioner filed a motion for rehearing which was denied by order dated December 10, 1993 and Petitioner filed a motion for reconsideration for rehearing which was denied by order dated Jan 11, 1994. Reproduced in the Appendix at A-1 and A-6. The Jurisdiction of this court is invoked under 28 U.S.C. 1254 (1) (2).

Statement Of The Case

This is a summary Judgment case which presents the court with the opportunity to clarify the application of the evidentiary Burden placed upon the Petitioner Gilder in an employment discrimination Suit brought under Title VII and to clarify the application of Frederick Hart & Co, in v Recordgraph Corp., 169 F. 2d 580 (3rd Cir. 1948); United States Ex Rel. Kolton v Halpern, 260 F. 2d 590 (3d Cir 1958); United States Ex-Rel Nobles v Ivey Bros Const. Co; Inc. 191 F. Supp 383 (D. Del. 1961); Jamison v Pennsylvania Salt Mfg. Co zz F.R.D. 238 9 W.D. Pa 1958) Bunny Bear, Inc V Dennis Mitchell Industries 139 F Supp 542 E.D. PA. 1956; Levy v Equitable Life Assur Society 18 F.R.D. 164 (E.D. Pa 1955) St. Mary's Hicks 1993 Wl 220265 (June 25, 19930 to the Summary Judgment Stage of a discrimination case. The need for clarification of these cases and St. Mary's at the Summary Judgment Phase is demonstrated by Statements made in both the majority opinion and in the dissent.

The majority opinion in St. Mary's stated that after the establishment of a Prima Facie case by the Plaintiff and articulation by the employer of its reason, that:

The Fact Finder's disbelief of the reasons put forward by; the defendant (Particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the Prima Facie case, suffice to show intentional discrimination (p.5, opinion).

This language obviously would indicate that evidence constituting a Prima Facie Case, plus evidence sufficient to raise factual issues that the employer's reasons are unworthy of credence" will defeat a motion for summary judgment.

And when the adverse party, in opposing the motion does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial but instead, the adverse party Rest on Averments of his pleading which on their face present an issue.

In this situation third circuit case have taken the view that summary judgment must be denied at least if the averments are " well pleaded" and not supposititious conclusory or ultimate and permit the case to be tried. Other portions of the majority opinion in St. Marys v Hicks, however can be interpreted to down play the value of the Prima Facie case as providing sufficient, proof of intentional discrimination in this situation.

These portions causes the Dissent to observe that the majority opinion"... gives conflicting signals about the scope of its holding in ;this case (p 16). The dissent points out that the majority's language, quoted above and the remand in St. mary's would require denial of an employer's motion for summary judgment under such evidence and the remand in Frederick Hart & Co Inc. v Recordgraph Corp., 169 F. 2d 580 (3rd Cir 1948); United States ex rel Kolton v Hal Pern 260 F. 2d 590 (ed Cir 1958) United States Ex rel Nobles v Ivey Bros Constr Co Inc 191 F. Supp 383 [D Del 1961) Jamison 1958)Bunny Bear, Inc v Dennis mitchell Industries 139 F. Supp 542 (E.D. PA 1956).

Levy v Equitable Life Assur Society 18 F.R.D. 164 (E.D. PA. 1955) would required denial of An employer's motion for summary judgment under such evidence, but the dissent goes on to Question whether this is what the majority intended, stating:

But other language in the court opinion supports a more extreme conclusion, that proof of the falsity of the employer's articulated reasons will not even be sufficient to sustain judgment for the Plaintiff for example, The Court twice states that the Plaintiff must show both that the reason was false and that discrimination was the real reason ante, at 13; see Ante at 5.

In of over earlier cases, the court states that [i] is not enough... to disbelieve the employer... Ante, At 17 (emphasis omitted) The Pre Text-plus Approach would turn burden on its head, see N.7, supra, and it would result in summary judgment for the employer in many cases where the plaintiff has no evidence beyond that required to prove a Prima Facie case and to show that the employer's articulated reason are unworthy of credence. [Emphasis added p. 16]

In instant case presents the court with the ideal opportunity to eliminate any and all confusion about the standard of Proof required of a claimant to withstand summary judgment in this situation. A summary judgment was granted to the employer [Aetna Life Insurance] even though a Prima Facie case was established by Petitioner Debra A. Gilder as both lower courts found.

Debra A. Gilder petitioner also presented evidence from Aetna Life Insurance own records and witnesses that showed that the reason it advanced for Debra A. Gilder termination in its motion for summary Judgment was unworthy of credence.

Both courts ignored the inference of race, sex discrimination coupled with fraud upon the plaintiff Gilder created by the Prima Facie case as well as other direct evidence. This direct evidence consists of the Aetna Life Insurance Procedural checklist for performance under appendix A-20 Aetna Life Insurance Progressive discipline checklist appendix A-21. Aetna Life Insurance-written warning address to Debra A. Gilder appendix A-22.

Aetna Life Insurance-Probation warning address to Debra A. Gilder appendix A-23, Aetna Life Insurance - Disciplinary Process of appellant Gilder Job appendix A-24. Aetna Life Insurance - Termination letter address to Debra A. Gilder Appendix A-25 and the Plaintiff Gilder response to the defendant Aetna motion for summary judgment part one and part two, but the court inferred that the petitioner Gilder submitted no admissible evidence to sustain the employer (Aetna) Summary judgment motion. If the respondent Aetna Life Insurance showed Lawful motives rather than inferring and unlawful motive, as required by this court for evaluating evidence at the summary judgment stage. While it is believed that granting this petition for writ will allow the court to clarify matters in this important area, the uncertainty can also be dissipated in a less formal manner by the court remanding this case to the trial court with instructions to reevaluate Gilder evidence of pretext under the unworthy of credence standard as expressed in Texas Dept. of community affairs v Burden, 450 U.S. 248, 101 SCT 1089 (1981) and now in St. Mary's.

It is also urged that such a remand should point out that inferences drawn from the adverse party (Gilder petition) in opposing the summary judgment motion does not produce any evidentiary matter, or produces some but not enough to establish there is a genuine issue for trial, instead, the adverse party Gilder petitioner rest on averments of her pleading which on their face present an issue and in this situation Third Circuit Cases have taken View that summary-judgment must be denied, at least if the averments are "well pleaded." The fifth Circuit's opinion does great injustice to Gilders, and if allowed to stand uncorrected will also further the confusion which the dissent believes now exists from the opinion in St. mary's and Frederick Hart & Co., Inc. v Recordgraph Corp, 169 F. 2d 580 (3d Cir 1948) United States Rel Kolton v Halpern, 260 F 2d 590 (3d Cir 1958); United States ex rel nobles v Ivy Bros Constr. Co Inc. 191 F. Supp 383 (D. Del 1961) Jamison v Pennsylvania Salt Mfg Co 22 F.R.D. 238 (W.D. Pa. 1958) Bunny Bear Inc V Dennis Mitchell Industries 139 F. Supp 542 [E.D. Pa 1956] Levy V Equitable life Assur Society 18 F.R.D. 164 [E.D. Pa 1955].

It is vitally important that the lower courts the equal employment opportunity commission, United States Department of Labor, U.S. Justice Department, NAACP Varies Civil Rights organizations and Practitioners in this field understand and apply the correct legal standards to evidence of Pre text ar the summary Judgment Stage of any type of discrimination case where a Prima Facie case has been presented. Since the courts below concluded that Gilder's evidence of Pre text was not sufficient, they did not set forth many of the relevant facts in their opinions.

It is therefore necessary to set Forth the important evidence that were before the court on the motion for summary judgment. For the convenience of the court, the evidence is grouped into two categories, those facts that are undisputed and those facts where there is some degree of controversy.

I. Undisputed Summary Judgment Fact

Prior to the Petitioner Gilder discharge, Gilder had been employed by the respondent (Aetna) in September 21, 1981 as a unit assistant, class 18. On April 12, 1982 Gilder was promoted to United Assistant class 19.

And on 8-17-1992 Gilder were promoted to claim procession trainee, class 21 and on Jan 18, 1993 Gilder were promoted to Group claim processor, Class 22, and on August, 1993 Gilder was promoted to Senior Group Claim Processor class 23 and in June 3, 1985 Gilder was promoted to Field claim examiner class 24. Gilder was terminated May 20, 1987 for unsatisfactory performance.

II. Facts As To Which There Is Some Degree Of Dispute

A Field Claim Examiner paid claims under Aetna's various benefit plans. The position description lists the job's two objective measures of performance as quality and average daily production. See Def. Second S/J., Exh. D. Defendant's home office set forth certain minimum standards of performance (MSP). See Def. Second S/J, Exhs. E. and F. Employees were rated according to the standards set by the MSP.

The summary judgment evidence indicates that plaintiff was formally disciplined for poor quality in late 1985 and late 1986. The verbal warning was extended on November 12, 1985 and plaintiff was placed on written warning on January 10, 1986. After she showed improvement, plaintiff was removed from written warning on February 10, 1986. See Def. Second S/J, Exh. G.

Satisfactory performance continued until plaintiff's quality results failed to meet requirements in September and November, 1986. Plaintiff was again placed on verbal warning on November 11, 1986, See Def. Second S/J, Exh. H.

Plaintiff's three month average of weighted claims per day for December, 1986 through February 1987 did not meet standards and resulted in a Written Warning on March 13, 1987. See Def. Second S/J, Exh. K. Plaintiff's difficulties continued. In April 1987, defendant lowered plaintiff's production goals; placed her on probation; and explicitly warned her that failure to meet probation terms may result in termination.

See Def. Second S/J,Exhs. L and M.

On May 20, 1987, after plaintiff had failed to meet the reduced production goals mandated by her probation, defendant Aetna terminated plaintiff's employment. See Def. Second S/J, Exh. N, Defendant also notes that similarly situated non-black and male employees have been disciplined and discharged for less serious

performance deficiencies. See Def. Second S/J, Exh. O. The Department of Labor analysis, affidavits from supervisors, and statistical breakdown of hiring and terminations indicate that defendant did not engage in discriminatory conduct. See Def. Second S/J, Exh. C; Exh. P; and Exh. Q.

After reviewing the summary judgment evidence, the Court finds that while plaintiff subjectively believes that she has been discriminated against, the record indicates otherwise. Defendant has articulated legitimate, non-discriminatory reasons for terminating plaintiff Gilder in May, 1987. The Court finds no genuine issues of material fact which preclude the granting of summary judgment in this matter.

Accordingly, the Court hereby DENIES defendant's first post- discovery motion for summary judgment. The Court hereby GRANTS defendant's second post-discovery motion for summary judgment and hereby DENIES plaintiff's Title VII race and see discrimination claims. Plaintiff's claim that defendant Aetna violated Executive Order 11246 is hereby DISMISSED.

On or about April 13, 1992 Gilder Filed suit in the U.S. District court seeking relief under Title VII 42 U.S.C 2000e Job Discrimination and executive order 11246 written by President L.B. Johnson as a result of the Defendant-Appellee Aetna Life Insurance violation of Title VII U.S.C 2000e Job Discrimination and the Executive order 11246. On or about 6-15-93 The District Court Judge H.F. Garcia enter the appellant Gilder motion for a interlocutory appeal in the District court as a notice of appeal for the U.S. Court of appeal for Fifth Circuit on the basis Interlocutory decrees of such district courts or judges there of determining the Rights and Liabilities of the parties.

When the district Judge in making a civil action an order not otherwise appealable under 28ss 1292b unless it involves a controlling Questions of Laws as to which there is substantial Ground for difference of opinion.

On May 6, 1993, The Trial Judges entered an order granting summary Judgement against Plaintiff-Appelllant Gilder. In his order, trial judge declined to rule upon whether the Plaintiff-Appellant Gilder Proved a Prima Faca case.

On 6-15-93 The appellant Gilder notice of appeal to the court of appeals for the Fifth Circuit were filed by the District Court. A Panel of this court subsequently heard Gilder appeal and November 17, 1993 The Panel issued a decision affirming Judgement in Favor of Aetna Life Insurance the Defendant appellee on the Plaintiff Appellee Gilder Title VII 42 U.S.C 2000e Job Discrimination and Executive order 11246 and ordering the appellant Gilder to pay the difference appellee Aetna the cost of appeal.

Statement of Facts

The court order issue 11-17-93 Petition of writ certior Appendix A-1. Appendix File with EN BANC Rehearing] states that after carefully reviewing the Parties Briefs on appeal the Panel are not persuaded that Gilder presented Admissible Evidence that Aetna's legitimate, nondiscriminatory reasons for firing her were Pretext for Illegal Discrimination under the U.S. District Court Docket Sheet # 125, 127, 128, 130. The appellant Gilder did not sibmit a Appendix to her briefs due to the court of appeal letter dates 6-24-1993 stating an Appendix to breif prescibes by F,R..AP is not required. Since the appellant Gilder had to solely depend on the court of appeal for instructions, examples, Rules of the Courts, did the court mislead the appellant Gilder in this letter which is materially effected the outcome of the case to appellant appeal and substantually Impaired the appellant Gilder rights.

The court orders issue 11-17-93 [Exhibit _A__ Appendix File with EN BANC Rehearing] states as the District court held there is thus no genuine issue of material Facts.

And Summary Judgement was correctly granted for Aetna. Furthe the Panel see no reversible error in the Disrict Courts orders of which appellant complains or otherwise. The appellant Gilder genuine issues of material facts were filed as admissible Evidence under the District Court Docket Sheet 21, 22, 32, 54, 60, 61, 62, 63, 64, 66, 67, 70, 76, 77, 80, 82, 83, 87, 88, 89, 90, 91, 103, 107, 113, 122 and under the 1963 Amendment. The adverse party is opposing the motion does not produce any evident, any matter, or produces some but not enough to establish tht there is a geniuine issue for trial. Instead of the adverse Party Appendix A-1 for writ of certiorari.

Rest on Averments of his other Pleading which on their Face Present an issue. In this situation Third Circuit cases have taken the veiw that Summary Judgement must be denied, at least if conclusory or ultimate.

Fredrick Hart and CO., Inc v Recorgraph Corp 169 F. 2d 580 (3rd cir 1948) United States ex Rel Kolton v Halpern 260 F. 2d 590 (3rd cir 1958)

United States Ex Rel Nobles v Ivey Bros constr. Co., Inc 191 F. Supp 383 (D. Del 1961) Jamison v Pennsylvania Salt Mfg Co 22 F.R.D. 238 (W.D. PA 1958)

Bunny Bear, Inc v Dennis Mitchell Industries 139 F. Supp. 542 [E.D. PA. 1956) Levi v Equitable Life Assur Society 18 F.R.D 164 [E.D. 1955). Judgement enter into this case is contrary to law.

On appeal the appellant Gilder complained among other things, that the District Court had erred in not addressing orders that were still under answered by the District Court Docket Sheet 103 and 113, motion for trial by jury and a motion for another court appointment of counsel since the order D.C Docket Sheet 61 states that the appellant Gilder lack proffessional skills in handling her case.

But yet the District Court still issue summary judgement with the pending motions which substantially Impaired the appellant Gilder Rights and materially effected the outcome of the case and deprived the appellant Gilder of Due Process.

This appeal Involves complexed issues of law and Facts that such issues if the District Court's conclusion and the Panels conclusion in this case is contrary to law and such issues involves controlling questions of law. And to which there is sustantial grounds for difference of opinion and determining the Rights and Liabilities of the Parties involved controlling questions of law.

The attach Exhibits_I of appendix for rehearing En Banc/ Appendix A-15 Petition for Writ of Certiorari states that the Pro-se motions and applicaitons are to be handled by the staff attorney office. The staff attorney office Processes the Pro-se motions, applicaiotns, and makes recommendations for Cerifictes of Probable Cause, Motions for appointment of counsel, etc. Memorandum on the merits of the case is also prepared when all breifs are filed but the Docket Sheet of the court of appeal Exhibits__E____ appendix

file with EN BANC] Petition of Writ Cetiorai A-11 show that appellant Gilder appeal, motions, and the processing of appellant Gilder's Breif and Record excerpts were handled by the circuit clerk office instead of the staff attorney's office and the circuit clerk office allowed the Defendant appellee Aetna's attorny to not file an attorney appearnce, Cyndi Bendict, but to file a motion to extend the filing of these breifs which did not conform to FRAP 27.4 Rule, the Court allowed the appellee Aetna attorney to file a late attorney appearance, after the extension of time to file their breifs and the Panel's decision as to reversible error of summary Judgement deprived the appellant Gilder of a meaningful appeal under Title VII due to the appellant appeal were not processed correctly and due to clerical mistakes. FRAP 27.4 Rule Exhibit H Appendix A-14 Petition for Writ of Certiorari.

The Defendant Appellee Aetna Statement of Facts Filed into the Fifth Circuit on 9-23-93 states the appellant Gilder was hired by Aetna on December 1981 is Pretext attach Exhibit File into District Court by the Defendant appelee Aetna attorney Cyndi Benedict [Exhibit K Appemdix File] States the appellant Gilder were hired September 21, 1981. Appendix A-19 Petition for writ of certiorari.

The Defendant appellee Aetna breifs states that by late 1985 Gilder began recieving formal discipline for poor quality work [Exhibit K Appendix File] Put also Appendix A-19 Petition for writ of certionari states appellant Gilder had a verbal warning given on 10-18-85 for failing to meet Performance standards and 11-12-85 a verbal warning was supposed to be extended for failure to meet Performance standard [Exhibit N Appendix A-20] states that the Appellant Gilder was removed from warning on 2-10-86. This evidence was submitted to the District court under the appellant Gilder response to Part Two of the Defendant Breifs in support of its motion for Summary Judgement under D.C. Docket # 131 Second response of Appellant Gilder.

The Defendant Appellee Aetna Statement of Fact are Ptretext atating the appellant Gilder still had poor quality work and the appellant Gilder did not Improve Performance Standards.

The Defendant appellee Aetna Breifs stated that the appellant Gilder recieved a second verbal warning on November 11, 1986 but fails to tell the court that the appellant Gilder was removed from this warning on December 1986 see Exhibit P appendix also appendix A-21 Petition for writ of certionari. The Defendant appellee Aetna Breifs shows Pretext for Illegal Discrimination.

Now Exhibit U filed in the United States District Court for motion by the appellant Gilder for New Trial D.C. Docket Sheet 135 This Exhibit is a written Deposition of Alfredia Stevens questions 27 answer: It was office policy that you had to stay in a position for 6 months before being promoted to another one. And Exhibit E of the appellant Gilder Response to the Defendant Appellee Aetna summary Judgement D.C. Docket Sheet 131 States a processor must be meeting the requirements of the higher job class ion all three categories base I on a Rolling Six Months.

Now if the appellant Gilder was removed from all warnings in 1985 and then in 1986 Exhibit P of the rehearing of the En Banc/ Appendix A-21 of the Petition of writ of certiorari and Exhibit O of the rehearing of the En Banc/Appendix A-31 of the Petition of Writ of certiorari states that the appellant Gilder was removed from all warning. Exhibit N appendix of rehearing EnBanc/ Appendix A-20 Petition for writ certiorari.

Now if Appellant Gilder was removed from all warnings in 1985, 1986 and the attach Exhibit U of New Trial in D.C. Docket Sheet 135 and the Exhibit E of Appellant Gilder response to S.J. D.C. Docket 131 states the appellant Gilder Job requirements are based on a Rolling Six Months, then in the year 1987 what happened to the appellant Gilder verbal warning - where did it start and when did it start. Now the written warning given on March 13, 1987 should have the appellant Gilder Performance of Jan 1987 to March 1987 [Exhibit Q Appendix of the rehearing En Banc/Appendix A-22 Petition for Writ of Certiorari states the appellant Gilder Performance for the Period December - February.

This information is Pretext because Exhibit N, O, and P of Rehearing En Banc / Appendix A-20 (N),21 (P)/Appendix A-31 (O) states in December the appellant Gilder was removed for all warnings. The Defendant appellee States the appellant Gilder had Poor Quality and Performance but fail to show the appellant Gilder Poor Quality and Performance of the appellant Gilder Job Requirement from Jan 1987 to March 13, 1987.

Exhibit Q Exhibit of the rehearing En Banc/ Appendix A-22 states that the appellant Gilder as of March 13, 1987 was placed on written warning effective March 13, 1987 to April 13, 1987 and the appellant Gilder During this period will be expected to meet the production requirement of 110 weighed claims per day while attaining quality and results of 95.90% pay dollars and 98.60% statistical accuracy. But Exhibit R Appendix states of the rehearing En Banc/Appendix A-23 of the Petition of Writ of Certiorari.

The appellant Gilder results for March were 76.72% pay 89.55 statistical. 86.21 Incidence 96.72 coiling and average Production of 98.97%.

First of all the appellant Gilder did not receive this letter. Second this letter is Pretext because Exhibit Q of the appendix of Petition for rehearing En Banc/Appendix A-22 of the Petition of Writ of Certiorari states the appellant Gilder would be expected to meet Production and Quality form period of March 13, 1987 to April 13, 1987 and the probation letter never telling the court or appellant Gilder what day in March the appellant Gilder statistical or Performance Standards started and the probation letters never tells of the appellant Gilder's results of the month of April.

Exhibit S of the Appendix of Petition for rehearing En Banc/ Appendix A-24 of the Petition of Writ of Certiorari Aetna Disciplinary process state each stage of the production quality disciplinary Process (verbal, written, probation) will be in effect for a maximum of 30 days but the attach Probation letter is pretext because it does not follow Aetna's Disciplinary Process of 30 days. So on the written warning issue March 13, 1987 the record show that the appellant Gilder being placed on written warning when the appellant shouldn't be because of the appellants overall performance

is accumulative in a Rolling Six Months and in order to go on disciplinary, see Exhibit S of the appendix filed with En Banc Rehearing / Appendix A-24 of the Petition of Writ of Certiorari. And the Probation warning shouldn't even be given because Jan 1987 to April 1987 is four months.

Now the Exhibit T for the rehearing En Banc / Appendix A-25 of the Petition of Writ of certiorari. Appendix Termination letter states that on April 20, 1987 the appellant Gilder was placed on probation because of the appellant Gilder's November results. Exhibit N, O and P Appendix states that the appellant Gilder was removed from warning.

Now this Exhibit T of the appendix for the rehearing En Banc / Appendix A-25 of the Petition of writ of certiorari, do not have the appellant Gilder Performance Requirements that the Probation letter 4-20-87 stated. The Termination letter only has April results which this letter do not state which day in April these statistical were taken and the Termination letter is Pretext due to it does not have the appellant Gilder Performance Results from the Probation Period of

April 20, 1987 to May 20, 1987 and it does not comply with Aetna Disciplinary Process of appellant Gilder Job Requirements of the appellant Gilder overall Performance accumulative over 6 months. Exhibit S for the rehearing En Banc / Appendix A-24 of the Petition of Writ of Certiorari. Six months has not passed in order to Terminate the appellant Gilder's Job, or put the appellant Gilder on written warning, probation, or termination. The Appellant Gilder should not be on warning of any kind.

Six months has not pass in order to disciplinary the appellant Gilder for failure to meet Performance Requirement of appellant Gilder job. The appellant Gilder has showed and presented admissible evidence that Aetna's Legitimate, nondiscriminatory reasons for firing the appellants Gilder were Pretext for illegal discrimination and that there is genuine issues of material facts and that Summary Judgement should be denied and a reversible should be given. Aetna Life Insurance did not file into District Court the appellant Gilder Performance appellant for the year of 1987 which supports show Poor Performance and Quality work of the appellant Gilder.

There is an Exhibit of a performance Appellant for the year of 1987 which were suppose to show poor performance and quality work of the appellant Gilder. There is an Exhibit of a performance file in the appellant Gilder response to defendant appellee Aetna motion for summary Judgement D.C. Docket sheet 131. How can the defendant appellee Aetna state that the appellant Gilder has poor quality and performance and the defendant-appellee Aetna withheld admissible evidence of the appellant Gilder performance in the year of 1987, Jan. to May. The appellee Aetna creates this file to get out of their illegal discrimination and their violation. If executive order 11246 written by President L.B. Johnson.

Under the appellant Gilder motion for new trial D.C. Docket Sheet 135 Exhibit 1 for Angelina Pardo performance appraiser Exhibits Brenda Riffle Exhibit Z for Debbie Buhem. These are non-black, failing to meet either production standards or Quality Standards and there is no disciplinary action taken against these employees for failing to meet performance and quality.

Brenda Riffle is failing to meet requirement for one year and their is no verbal warning issued giving to these non-blacks. But in the appellant Gilder file 6 months has not past, yet after three month disciplinary actions on Pub on the black appellant Gilder.

Under Appellant Gilder's motion for new trial (D.C. Docket Sheet 135. The Plaintiff exhibit A standard of proof for a disparate treatment (3). States that the plaintiff-appellant Gilder must prove a Prima Facie case of discrimination or whether similarly situated employees were not hired under similarly circumstances and the plaintiff appellant Gilder showed court proof under exhibit 1 employees of Aetna. Angelina Pardo, exhibit 5, Brenda Riffle exhibit Z, for Debbie Brehm. The appellant Gilder proved that black employees were put on disciplinary action before non-blacks or before their allowed time for improvement.

Standards of Proof Exhibit U of Rehearing of En Banc/Appendix A-32 Petition for Writ of certiorari.

United States Ex Rel.Nobles v Ivey Bros Contr. Co; Inc.....
191 F Supp. 383 LD. Del 1961);

Jamison v Pennsylvania Salt Mfg Co., 22 F.R.D. 238 (W.D PA. 1958).....

Bunny Bear, Inc v Dennis Mitchell Industries....
139 F. Supp 542 (E.O. Pa 1956;)

Levy v Equitable Life 139 F. Supp .....
542 [E.D.Pa 1956];

Levy v Equitable Life Assur Society.....
18 F.R.D. 164 (E.D. P.A. 1955).

STATUTES

28 U.S.C.A. 1292(b).....
42 U.S.C. 2000e Title VII.....
Article 6 Section 2 of the constitution of U.S..

Preliminary Statement

Pursuant to Rule 35 of the Federal Rules of appellate Procedure, the plaintiff appellant Debra A. Gilder [here in after "Gilder"], respectfully suggest a rehearing of the appeal of this action and submit that the appeal is appropriate for rehearing by all judges of this court convened EN BANC in order to maintain uniformity within this circuit and ensure conformity with prior decisions of this court or the Supreme Court of the United States. Plantiff- Appellant Gilder additionally submits that the issues involved in this appea; are of sustantial Public Importance and thus should be addressed by the court as a whole.

Statement of Issues

The Panel in this case has issued a decision that is contrary to settled law, creates confusion for Trial courts and imposes a substantial Injustice on Plaintiff-Appelant Gilder. Specifically Plantiff-Appellant Gilder submit the following issues for the courts consideration

1. Whether the Defendant Appellee Aetna created the attach file in case No DC SA-92-CV-0394 to support their non-discriminatory reason against the appellant Gilder.

2. Whether the Defendant Appellee Aetna attorneys failed to follow the laws or make some misrepresentation of facts that their attorneys are following the law which by some fraud practiced coupled with some mistakes, errors, ignorance of appellant motions, pleads evidence,

materially deprived the appellant Gilder's rights and of a meaningful case under employment discrimination under 42 V.S.C 2000e Title VII or an appeal.

3. Whether the appellant Gilder Proved a Prima Face case under D.C NO SA 92-CV-0394 which summary judgement should not have been granted in favor of appellee Aetna

4. Whether the Panel erred into reviewing all issues presented on appeal by the appellant Gilder

5. Whether article 6 section 2 were violated in the appellant Gilder case in D.C. SA 92-CV-0394 and while it was in an appeal

6. Under the District Court Docket sheet 131 the appellant Gilder response to part Two of the Defendant Breifs in support of it second

Post-Discovery Exhibit Q written warning letter for appellant Gilder states as of March 13, 1987, to April 13, 1987, Production and Quality of the appellant Gilder. Did the District court err in not considering the appellant Gilder Performance Requirement for this period to come to its conclusion of summary judgement. Did the court erred in considering a invalid document.

7. Under the same Exhibit Q, in the warning states the appellant Gilder will be expected to meet the Production Requirements of 110 weighed claims per day, 95, 90,
pay dollars and 98.60% statistical accuracy from March 13, 1987 to April 13, 1987 and April 20, 1987 the appellant was expected to attain 100 weighed claims per day, 96% incidence 98.7 coiling. Why didn't the court allow appelant Gilder's discovery matters on these performances. These documents are contrary to Aetna's discipline action standards and is

contrary to conclusion and favor summary judgement because these two documents shows pretext for firing the appellant Gilder was for illegal discrimination.

Respectfully submitted;

_____

Debra A. Gilder
Pro-se/Plaintiff/Appellant
P.O. Box 200691
San Antonio, Texas 78220
(210) 337-1545
(210) 333-2914

Certificate of Service

By my signature above, I Debra A. Gilder Appellant do hereby certify that a true and correct copy of the foregoing response, Appellant-record excerpts has been served by certified mail, return receipt requested, to the following, on this 1 day of December 1993, to the following.

Fulbright & Jaworski L.L.P.
Counsel for Aetna Life & Casualty
W. Wendell Hall
300 Convent Street Suite 2200
San Antonio, Texas 78205

United States Department of Justice
Honorable Ronald F. Ederer
John F. Paniszczyn
United States Attorney
727 E. Durango Blvd A-601
San Antonio, Texas 78206-1199

A-4

The United States Court of Appeals

for the Fifth Circuit

No. 93-8397

Debra A Gilder,

vs.

Aetna Life and Casualty

Appeal from the United States District Court

for the Western District of Texas

ORDER:

It is ordered that appellant's motion for leave ot file suggestion for rehearing EN BANC one day out of time is **DENIED.**

DATE **DENIED** DEC. 10, 1993

IN THE UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

IN RE

NO. 93-8397

DEBRA A. GILDER,

PLAINTIFF-APPELLANT,

VS

AETNA LIFE AND CASUALTY,

DEFENDANT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO D.C. NO. SA-92-CV-394

Appellant's Gilder motion for a reconsideration for her Petition for suggestion of rehearing En Banc alternative motion to be relief from order Dec 10, 1993. Judgement filed in case 93-8397 under Rule 60(a)(b) Fed. R. Civ. P. and under the U.S.C.A. 28 1292(b)/motion for plain errors under U.S.C.A. 103(d) in case 93- 8397.

Respectfully Submitted,

_____

DEBRA A.GILDER

Pro-Se/Plaintiff/Appellant

P.O. Box 200691

San Antonio, Texas 78220

(210) 337-1545

(210) 333-2914

To The Honorable Judge of Fifth Circuit;

Here come the Appellant Gilder Pro Se on December 16, 1993 in the Fifth Circuit Denying the appellant Gilder Petition for suggestion of rehearing En Banc on Dec 10, 1993. The appellant Gilder feels her rights has been violated up under the United States Constitution of Due Process and a right to a Appeal.

Under F.R.A.P. 27 it has a Rule for a Pro-Se Application and the court has made a error in not allowing the stay attorney office to assist the appellant Gilder with all of her motions and Briefs. The appellant Gilder is a Pro-Se and the Appellant Gilder express a belief based on controlling questions of law as to which there is substantial grounds for difference of opinion and determining the rights and liabilities of the parties involved controlling questions of law. The appellant Gilder were called by the United States court of appeals office on or

about Dec 2, 1993 and informed the appellant Gilder that her Petition for suggestion of rehearing En Banc that she were one (1) Day later and the clerk office ask the appellant Gilder to file a motion in explaining why her petition was one day late. The appellant Gilder did what the U.S. Court of appeal clerk office suggested in filing a motion for a one day extension of time due to the appellant Gilder misunderstanding of filing the petition. Under the order of the United States District Court in Case SA- 92-CV-0394 Docket Sheet 61 states the appellant Gilder lack professional skills in handling her case and due to appellant never having any training in law. The appellant feels that her rights has been violated because the U.S. Court of Appeals holds the Law against the Appellant and the court has made numerous of errors in appellant Gilder case and now will not allow the appellant Petition for En Banc to be heard. Under Exhibit L F.R.A.P. 46.2 entry of appearance attorneys admitted to the Bar of the

court shall enter their appearance in which they participate at the time the case is docketed, under Exhibit E the United States Fifth Circuit Docket Sheet the appellant Gilder appeal was Docketed on June 18, 1993 by the U.S. Fifth Circuit Clerk Office. The United States Courts of appeal allowed the Defendant-Aetna Life Insurance License attorney Cynthia M. Benedict to not to file a entry of appearance in to the United States Court of Appeal of Fifth Circuit in the month of June. The court allows a License attorney who has study law to make a mistake and when the appellant Gilder who has not studied any law make a mistake or error the court denies her motions, briefs, petitions. The Court uses the Laws on the appellant Gilder and do not apply them to the Defendant-Appellee Aetna Life Insurance. The United States Court of appeal of Fifth Circuit did not refuse any thing from the appellee Aetna Life Insurance even though they violate the F.R.A.P. 46.2 in filing of a entry of appearance.

The court of appeals continue in violating the appellant Gilder Rights and a right to appeal by allowing the Defendant appellee Aetna Life Insurance Attorney Cynthia M. Benedict who did not file A entry of appearance into the U.S. Court of appeal of Fifth Circuit file a motion exhibit D into the court without following F.R.A.P. 27(a) Exhibit H.

The U.S. court of appeal of Fifth Circuit do not kick the Appellee Aetna Life Insurance motion out or Rule on a default judgment for appellant Gilder. The court of appeals of Fifth Circuit continues in violating the appellant Gilder rights by failing to use and apply their of Rules and Law on the appellee Aetna and apply them only on the appellant Gilder. Now under Rule 46.2 Exhibit L the court of appeal still allow the Defendant Appellee Aetna to file a entry of appearance three months late exhibit E United States Court of Appeals Docket sheet appearance File 9-16-93 by W. Wendell Hall and

exhibit G. The defendant appellee Aetna is allow to make a mistakes, errors and the United State Court of Appeal do not deny their appearance, extension of time, but Deny the appellant Gilder rehearing En Banc because she misapplied or misunderstand the Rules.

The court of appeal continue to violate the appellant Gilder rights because the U.S. Court of appeal clerks office did not send the appellant Gilder any letters stating they accepted the late appearances, no appearance of the Appellee attorneys and the court did not send the appellant Gilder a letter confirming that the U.S. Court of appeal of Fifth Circuit had granted the appellee Aetna extension of time for filing their Briefs. The court of appeals of the Fifth Circuit has substantially impaired the appellant Gilder rights and materially effected the out come of the appellant Gilder case and appeal by not allowing equal Justice and not correcting their errors in handling of appellant Gilder appeal.

After the court of Appeals extend the appellee Aetna time for filing their Briefs the court of appeal clerk office allows the Appellee Aetna to still file their Brief late one day exhibit E. U.S. Court of appeal Docket Sheet page 2 shows the appellee Aetna to file their Brief on 9-23-93 and the United States Court of appeal clerks office Do not reject the appellee Aetna Briefs and the court of appeal do not issue a order but when the appellant Gilder file her Petition for suggestion of rehearing En Banc and it one day late the court of appeal deny the appellant Gilder petition. The appellant Gilder files her motion for reconsideration/alternative motion to be relief from order Dec 10, 1993 Judgement file in case 93-8397 Under Rule 60(a)(b) Fed. R. Civ. P and under the U.S.C.A. 28 1292(b)/ motions for plain errors under U.S.C.A. 103(d) Due to the appellant Gilder has been deprived of due process in the appellant Gilder appeal and the appellant Gilder Rights was substantially impaired and equal justice of

the law not been applied in the appellant Gilder appeal-case. Furthermore, the Plaintiff - Appellant Pro-Se gilder respectfully suggest that the Judges of this court order the appellant Gilder motion for reconsideration for her Petition for suggestion of Rehearing En Banc alternative motion to be relief from order Dec 10, 1993 Judgement file in case 93-8397 under Rule 60(a)(b) Fed. R. Civ. P and under the U.S.C.A. 28 1292(b) motion for Plain Error under U.S.C.A. 103(b) in case 93-8397.

Respectfully submitted,

By _____

DEBRA A. GILDER

Pro-Se/Plaintiff/Appellant

P.O. Box 200691

San Antonio, Texas 78220

IN THE UNITED STATES COURT OF APPEAL

FIFTH CIRCUIT OFFICE OF THE CLERK

NO 93-8397

Honorable
Richard E. Windhorst, Jr
600 Camp Street
New Orleans, LA 70130

The Appellant Gilder would like to amend and add to her motion for a reconsideration for her Petition for suggestion of rehearing En Banc. The appellant Gilder wishes to add to pages which is attach and ask the clerks office to remove the page that states:

Furthermore, the Plaintiff-Appellant Pro-Se Gilder respectfully suggest that the Judges of this court order the appellant Gilder motion for reconsideration for her Petition for suggestion of Rehearing En Banc alternative motion to be relief from order Dec 10, 1993 Judgement file in

case 93-8397 under Rule 60(a) (b) Fed. R. Civ. P and under the U.S.C.A. 28 1292 (b) motion for Plain Error under U.S.C.A. 103(b) in case 93-8397.

Respectfully submitted,

By _____

DEBRA A. GILDER
Pro-Se/Plaintiff/Appellant
P.O. Box 200691
San Antonio, Texas 78220

The Appellant Gilder wishes to add a page to her motion on Nov. 9, 1993, the appellant Gilder son was shot four times. One bullet hit his chest, a bullet hit his shoulder and two bullets hit him in his back. The Appellant Gilder son's life was in critical condition and he survived by the Grace of God with his life. On Nov. 17, 1993, a order was issued in the appellant Gilder's case under 92-8397 and the appellant Gilder did not receive this order in the mail until Nov. 20, 1993, three days later. At the time the appellant Gilder had to refile for either a rehearing or a rehearing EN BANC. The appellant Gilder did not deliberately file her petition for rehearing EN BANC late. She honestly felt she had filed it on time. the appellant Gilder is not a professional attorney and do not have some one to help her in writing, reading and in investigating the law and the rules of the courts. The appellant Gilder is a common mother with five (5) children, has a full time job with Prudential Insurance Company. The appellant has

to attend to all five of her children's needs (school problems, peroral problems, etc.), and also have to attend to her husband needs who works out of town for the United States Army Border Patrol/ National Guard in Laredo, Texas. The appellant Gilder has to handle this Law Suit, come rain, snow, sleet, etc.. The appellant Gilder feels that one of her reasons for misapplying the wrong F.R.A.P. Rule to her petition for rehearing EN BANC was due to her son's life. If the Court wishes the appellant Gilder to file the hospital papers the appellant Gilder can. The appellant Gilder did not tell the court this when she filed her motion in for a extension to file her petition for rehearing EN BANC one day late is because this was a personal matter and it eas very hard for the appellant to talk on this matter. At the time the appellant Gilder could only pray. The appellant Gilder had to work on this appeal, while her son was still in critical condition. The appellant Gilder truely didn't mean to file late.

Under Frap 27.1.6 it states that the United States Court of appeal clerks offices has the authority to extend time for filing Petitions for rehearing for not longer than 30 days. And the appellant Gilder has read some of the internal operating procedures of the Fifth Circuit Court of Appeal and found that the clerks of the United States Court of Appeal for Fifth Circuit is Authorized to act for the court on large number of unopposed procedural motions. This delegation of the clerks authority to act for the court on large number of unopposed procedural motions has greatly facilitated the work of the court. The United States Court of appeal clerks office show Bias/Prejudice and despair treatment and discriminatory treatment against the appellant Gilder in case 93-8397. The Law states the clerk office is authorized to act for court on unopposed procedural motion and that the clerks are authorized and can grant extend of time 30 days for filing Petitions for rehearing but when the appellant Gilder upon

notice of the United States Court of Appeal clerks office calling the appellant Gilder to file a motion for extension of time the United States Court of Appeals Clerks office Do not act upon their authority in granting the appellant Gilder a one day extension of time for filing her petition for rehearing En Banc. The United States Court of Appeal Clerks Office gives the appellant Gilder motion to the court to review.

But when the appellee Aetna Life Insurance ask the United States Court of Appeal Clerks Office for extension of time to file their Briefs. The Unites States Court of Appeals Clerks Office grant the Appellee Aetna 21-day extension of time without given their motion to the court of appeal to review. The clerks office use their authority in granting the appellee Aetna motion of extension of Time without the appellee Aetna ever filing a motion into the court of appeal by only a letter which does not comply with the United States Court of appeal Rule FRAP 27 and

allow the appellee Aetna attorney to not to even file a appearance into case 93-8397.

Wherefore, premise considered, Appellant Gilder prays that her motion for a reconsideration for her petition for suggestion of rehearing En Banc alternative motion to be relief from order dated Dec 10, 1993, Judgement Filed in case 93-8397 under Rule 60(a) (b) Fed. R. Civ. P. and under the U.S.C.A. 28 1292 (b) motion for plain errors under U.S.C.A. 103 (d) in case 93-8397.

Respectfully Submitted

_____

Debra A. Gilder
Pro-Se/Plaintiff/Appellant
P.O. Box 200691
San Antonio, Texas 78220
(210) 337-1545
(210) 333-2914

A-6

United States Court of Appeals

For The Eleventh Circuit

case no. 93-8397

Debra A Gilder

V

Aetna Life and Casualty

Before Davis, Jones, and Duhe,Circuit Judges.

By The Court:

It is ordered that appellants's motion for recomsideration for her petition for suggestion of rehearing EN BANC alternative motion to be relief from order December 10, 1993, treated as motion for reconsideration of this court order of December 10,1993 is **DENIED.**

It is futher ordered that appellant's motion to be relief from judgment or order under rule 60 (a)(b) on order filed November 17, 1993, alternative motion of plain error under U.S.C.A.(103)d is **DENIED**.

U.S. Court of Appeals filed dated and **DENIED** Jan.11, 1994.

APPENDIX-7

United States Court of Appeal

For The Fifth Circuit

case no. 93-8397

Debra A. Gilder

v.

Aetna Life and Casualty

Before Davis, Jones, and Duhe, Circuit Judges

Per Curiam:

After carefully reviewing the parties' briefs on appeal in light of the proceeding in the District Court, we are nit persuaded that Gilder presented admissible evidence beyond her mere speculation that Aetna's Legitimate, non-discriminatory reasons for firing her was a pretext for illegal discrimination. As the District Court held, there is thus no genuine issue of material fact,

and summary judgment was correctly granted for Aetna. Further, we see no reversible error in the District Court's Order of which Appellant complains or otherwise. The charges of fraud make no sense AFFIRMED.

United States Court of Appeal AFFIRMED date Nov.17, 1993.

**Local Rule 47.5 Provides: The Publication of opinions that have no precedential value and merely decide particular case on the basis of well-settled principles of law imposes needless expense on the public and burdens on the Legal Profession. Pursuant to that Rule, the court has determined that this opinion should be published.*

*** Also see exhibit A of the appendix for Rehearing EN BANC.*

APPENDIX-8

UNITED STATES COURT OF APPEAL

FOR THE FIFTH CIRCUIT

case no. 93-8397

Debra A. Gilder

vs.

Aetna Life and Casualty

D.C. No. SA-92-CV-0394

Pursuant to Rule twelve(12) of the Federal Rule of Appellate Procedure you are hereby notified that the Record on Appeal has been Filed. The Brief for Appellant is now due within forty(40) days from this date in accordance with Rule 31 Frap. See Frap and Local Rule 28 and 31,as to the content of and time for filing briefs Local Rule 42.3.2, allows the clerk to dismiss appeals without notice if the Brief is not timely field.

An appendix to Brief prescribed by Frap.30 is not required. See Local Rule 30.1, for the excerpts from the record which are to be filed in Lieu of an appendix.

United States Court of Appeal Office of the Clerk dated June 24, 1993. Signed by the following:

Richard E. WindHorst,Jr.,Clerk

Donna Mendez / Deputy Clerk

Also See Exhibit B. of the Appendix for Rehearing EN BANC.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT OFFICE OF THE CLERK

CASE No. 93-8397

DEBRA A. GILDER VS AETNA LIFE & CASUALTY

Enclsed is a copy of the court's decision this day rendered in the above case. A Judgement has this day been entered in accordance there with pursuant to Rule 36 of the Federal Rules of appellant Procedure.

Rule 39, 40, and 41, F.R.A.P. and Local Rule 39 and 41 government costs petitions for rehearing and mandates. A Petition for rehearing must be filed in the clerk's office within fourteen (14) days from this date. Placing the petition in the mail on the 14th day will not surface.

If you were unsuccessful in the district court and on appeal and will be considering filing a petition of certiorari in the Supreme Court, there is no need to file a motion for stay of mandate under F.R.A.P. 41, since insurance of the mandate does not affect the time or the right to file such a petition.

The Judgement entered provides that plaintiff-appellant pay to defendant-appellee the coats on appeal.

Signed by Deputy Clerk DEBORAH M. TAYLOR dated 11/17/93

* see exhibit c of the rehearing en banc

A-10

Fulbright & Jaworski

300 Convent street, suit 2200

San Antonio, Texas 78205

August 31, 1993

NO.93-8397; Gilder v. Aetna Life and Casualty;

United States Court of Appeal

for The Fifth Circuit

Ms. Nancy Dolly

United States Cuort of ppeals for the

Fifth Circuit Office Of The Clerk

600 Camp street

New Orleans, Louisiana 70130

DEAR MS. DOLLY

This is to confirm the 21-day extension of time for Aetna Life and Casualty to file its Brief. The new deadline for filing the Brief is September 22, 1993. The reason that Aetna requires an extension is due to counsel's absence from the office for extended periods of time during the past 30 days preparing discobery in other cases.

Also, please forward another notice of appearance of counsel form to the undersigned so that their attorney may appear as counsel of Record in this appeal on behalf of Aetna.

THIS LETTER WAS SIGNED BY CINDI M. DENEDICT ON AUG. 31, 1993.

APPENDIX-11

UNITED STATES COURT OF APPEAL

FOR THE FIFTH CIRCUIT

CASE NO. 93-8397

DEBRA A. GILDER

vs.

AETNA LIFE & CASUALTY

United States Court of Appeal Docketed Sheet Show:

Circuit five (5) appeal comes from Western Distict of Texas at San Antonio.

Date appeal docketed 6/18/93 $100 fee paid in District Court Judge H. F. GARCIA.

Date notice of appeal filed 6/15/93 District Court Docket # SA-92-CA-394.

Attorney for appellant: DEBRA A. GILDER (Pro-se)

Attorney for appellee: Fulbright & Jaworksi
300 Convent st. (suite 2200)
San Antonio, Texas 78205

Cynthia M. Benedict-files no attorney appearance.

W. Wendell Hall-files entry of attorney appearance 9/16/93.

FOUR MONTHS LATER (CASE DOCKETED 6/18/93)

Record, Exhibits and Brief Information

Record on appeal Date June 21,1993 no. of Vol. 12

Exhibits, one(1) envelope Date June 21,1993

Records Excerpts--appellant Date Aug.2,1993

Brief for appellant Date Aug. 2,1993 (36)

Brief for appellee Dated 9/23/93 (9)

Aetna is Late filing their Brief even when Court of Appeal grants the extension of time to 9/22/93

Extension flag motion for Appellee's Brief Date 9/2/93 Extension Dated 9/22/93

Appellant Gilder files a motion into court opposing any futher extension, -There is no Date enter into court this motion.

Calendar Information

Summary Panel: Wed, E.H. Jones, TMD Dated Nov.16,1993

Opinion Information non-published opinion

Opinion Rendered Dated 11/17/93 AFFIRMED by Jones

Other Docket Entried

Date 8/27/93 Flag notification re: contents of Record Excerpts.

Filed in Excerpts

Date 09/08/93 Flag appellants motion for Default Judgment sub to scrn judge to authorize extension of time authorized by the clerk.

Date 9/17/93 Flag order DENYING appellant's motion to strike the extension of time authorized by the clerk for filing of appellee's Brief (JLW).

Date 11/17/93 Flag order DENYING appellant's motion for Default Judgment (Jones).

Judgment Flag & Entered Judgment Date 11/17/93 *see exhibit e of the appendix for rehearing en banc*

IN THE UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

IN RE §

NO. 93-8397

DEBRA A. GILDER, §

PLAINTIFF-APPELLANT, §

VS §

AETNA LIFE AND CASUALTY, §

DEFENDANT-APPELLEE §

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO

D.C. NO. SA-92-CV-394

Appellant Gilder

Motion for Default Judgement in case No 93-8397 and alternative motion to reversed the decision of summary judgement in D.C. No. SA-92-CV 0394 and award the appellant Debra A. Gilder back pay for 6 years of 132,000 in compensatory damages and 10 million dollars in punitive damages. Come now Debra A. Gilder the correct name of the appellant in the case as style above moves this court for a response on motion for default judgement in case No 93-8397 alternative motion to reversed the decision of the United States District Court for Western District of Texas, San Antonio case D.C. No SA-92-CV-0394 in favor of Aetna Life Insurance a decision of summary judgement/and award the appellant Gilder, 6 years of back pay of $ 132,000 in compensation damages and 10 million dollars in punitive damages for violating the appellant Gilder rights under the VII and violating the executive order 11246.

Jurisdiction

Rule 60b Fed R.Civ P.

Rule 55 Fed P Civ P.

The attach letter dated August 31, 1993 states that appellee Aetna Life Insurance due date for filing of appellee's briefs is September 1, 1993. The appellant Gilder has not received the appellee Aetna Briefs as of Sept 6, 1993 and files its motion of default judgement on the appellee Aetna Life Insurance. On June 24, 1993 the appellant Gilder received a letter from the United States Court of Appeals Fifth Circuit Office of the Clerk stating pursuant to rule 12 of the Federal Rules of appellate procedures you are hereby notified that the record of appeal has been filed (D.C. SA-92-CV-394.

The brief for appellant is now due within (40) days from this date in accordance with Rule 31 F.R.A.P. in reading the F.R. Ap Rule 28 and 30 and local Rules 23 and 30 the clerk office sent to appellant Gilder alone with letter paragraph No 1. start working on your brief when the notice of appeal is filed or soon thereafter. Do not wait until a few day before the Brief is due. Before the United states court of appeals sent this letter the appellee Aetna Life Insurance knew that my case were going into a appeal by the order is sue June 15 199 and briefs enter into the United States District Court under Docket Sheet #140 the court accept these brief as the appellant Gilder timely filing of a notice of appeal of the Final judgment.

The appellant Gilder feel that the appellee Aetna Life Insurance has been given enough time to file this briefs, notice of appearance of

counsels to handle their behalf in this lawsuit and has committed negligence in not answering the appellant Gilder appeal and the appellant Gilder is entitled to a Default judgement in her favor and a reversed decision of the United States District Court final judgement in favor Aetna. The appellee Aetna had from June 15, 1993 to June 24, 1993. From the United States District Court order to the United States Court of appeal letter Dated June 24, 1993, nine days plus 3 days mailing which totals 12 days plus 40 days before their 30 day filing of their briefs and after the appellant Gilder brief were filed and the appellee Aetna 30 days are up. The Appellee has had 83 days and they still have not file their briefs.

Wherefore, premises considered, appellant Gilder prays that her motion for Default Judgement in Case No 93-8397 and Alternative motion to

reversed the Decision of summary judgement in D.C. No SA-92-CV 0394 and award the appellant Debra A. Gilder back pay for 6 years of $ 132,000.00 in compensation damages and 10 million dollars in punitive damages.

DEBRA A. GILDER
Pro-Se/Plaintiff/Appellant
P.O. Box 200691
San Antonio, Texas 78220
(210) 337-1545
(210) 333-2914

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTHE CURCUIT

NO. 93-8397

DEBRA A. GILDER

PLAINTIFF-APPELLANT,

VS

AETNA LIFE AND CASUALTY

DEFENDANT-APPELLEE

Appeal from the United States District Court for the Western District of Texas

---

Before DAVIS, JONES, AND DUHE, Circuit Judges

By the Court:

It is ORDERED that the motion of appellant for default judgement is DENIED.

*** U.S. COURT OF APPEALS FILED NOV. 17, 1993 BY CHARLES R. FULBRUGE III \ CKERK**

A-13

Fulbright & Jaworski

300 Convent street, suit 2200

San Antonio, Texas 78205

September 8, 1993

RE: CASE NO. 93-8397;

Debra A. Gilder

vs

Aetna Life and Casualty

In The United States Court of Appeals

For The Fifth Circuit

Honorable Richard E. Windhorst Jr. Clerk

United States Court of Appeals

600 Camp street

New Orleans, Louisiana 70130

DEAR MR. WINDHORST;

Enclosed is a form for appearance of counsel which we request that you file in the referenced appeal. As always we very much appreciate your assistance.

THIS LETTER IS BY AETNA ATTORNEY W.WENDELL HALL

This appearance is four month late (appendix 11) show appeal docketed 6-18-93 and the court of appeal for the fifth circuit didn't recevie this appearance until Sep. 16, 1993.

* see exhibit g appendix for rehearing en banc

Rule 46.2 Entry of Appearance

Attorneys admitted to the Bar of this Court shall enter their appearance in each case in which they participate at the time the case is docketed or upon notice by the clerk. A form for entry of appearance will be provided by the clerk.

Aetna attorney Cyndi Benedict filed no entry of appearance in The United States Court of Appeal for The Fifth Circuit.

United States Court of Appeal's Docket Sheet show that the case was Docketed 6/18/93.

* This extension of time do not comply to F.R.A.P. 27(a) Rule

Rule 27a Content of Motion; Response

Unless another form is else where prescribed by these Rules an application for an order or other relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, a affidavits, or other papers, they shall be served and filed with motion.

Aetna Attorney Cyndi Benedict Filed no motion into the United States Court of Appeal for The Fifth Circuit

see exhibit d appendix for rehearing en banc

F.R.A.P.

Rule 27 Motions

(a) Content of motions; Response unless another form is elsewhere prescribed by these Rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits, or other papers, they shall be served and filed with the motion.

27.4 Emergency Motion

Counsel having emergency motions or applications, whether addressed to the court or to an individual Judge, ordinarily shall file such petitions with the clerk rather than with an individual Judge. In matters where time does not permit the filing of a motion, or application in person, by mail, or by wire, contact with the clerk may be made by telephone and there after counsel shall file the motion in writing with the cleerk as promptly as possible. The motion application or contact shall contain a brief account of the prior actions of this orany other court or judge to which the motion or application or a substantially similar or related petition for relief, has been submitted.

see exhibit h for the rehearing en banc

APPENDIX-15

Emergency motions--The clerk will immediately assign the matter to the next Judge in rotation on the Administrative Interim Routing Log and to his Panel members. If the matter requires that counsel contact the Initiating Judge or Panel members personally, the clerk will advise the name of the Initiating Judge and the Panel members to whom the case is assigned after first getting approved from the Initiating Judge.

Pro-se Application--

Pro-se motions and applications are handled by the Staff Attorney Office. This section processes, and make recommendations to the court, on all motions for leave to appeal information pauperis, appplications for certificates of probable cause, motion for appointment of counsel, etc. A memorandum on the merits of the case is also prepared when all briefs are filed.

The United States Court of Appeal for the Fifth Circuit did not allow the Staff Attorney's Office to handle Gilder Pro-se Motions, Briefs and etc.

SEE EXHIBIT I OF THE APPENDIX FOR REHEARING EN BANC

APPENDIX-16

F.R.A.P

47.6 Affirmance without opinion

When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision:

1. That a Judgment of the District Court is based on finding of facts which are not clearly erroneous.

2. That the evidence in support of a Jury verdict is not insufficient.

3. That the order of an administrative Agency is supported by substantial evidence on the record as a whole or

4. In the case of a Summary Judgment, that no genuine issue of material fact has been raised by the appelant, and the court also determines that no error of law appears and an opinion would have no precedential value, the Judgment or Order may be affirmed or enforced without opinion.

FRAP 47.5.3 Unpublished opinions

Unpublished opinions are precedent, however, because every opinion believed to have precedential value is published, an unpublished opinion should normally be cited only when it (1) establishes the law of the case; (2) is relied upon as a basis for resjudication or collateral estoppel or (3) in values related facts.

see exhibit j appendix of the rehearing en banc

APPENDIX-17

1963 AMENDMENT

Rule of Civil Procedure (under Rule 56) Subdivision (e) the adverse party in opposing the motion does not produce any evidentiary matter or produces some but not enough to establish that there is a genuine issue for trial. Instead the adverse party rests on averments of his pleading which on their third face present an issue in this situation third circuit cases have taken the view that Summary Judgment must be DENIED, at least if the averments are "well pleaded" and not supposititious, conclusive, or ultimate.

Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, Summary Judgment must be denied even if no opposing evidentiary matter is presented. See Frederick Hart & Co., Inc. vs. Recordgraph corp. 169 F.2d 530(3d Cir. 1948);

United States ex. rel. Kolten vs. Halpern, 260 F.2d 590(3d Cir. 1958); United States ex. rel. Nobles vs. Ivey Bros. Constr. Co., Inc. 191 F.Supp. 383(D.Del. 1961); Jamison vs. Pennisylvania Salt mfg. Co. 22 F.R.D. 238(W.D.PA. 1958); Bunny Bear, Inc. vs. Dennis Mitchell Industries 139 F.Supp. 542(E.D.PA. 1956); Levy vs. Equitable Life Assur. Society 18 F.R.D. 164(E.D.PA. 1955).

see exhibit k appendix to rehearing en banc

**this is a reproduce copy. **

APPLNDIX-18

F.R.A.P.

46.2 Entry of Appearance

Attorney admitted to the Bar of this Court shall enter their appearance in each case in which they participate at the time the case is docketed or upon notice by the clerk. A form for entry of appearance will be provided by the clerk. In addition to other pertinent information such a form shall require counsel to cite all pending related cases and any cases on the docket of the Supreme Court, or this, or any other United States Court of Appeal, Which involves a similar issue or issues.

see exhibit 1 of the appendix to rehearing en banc

APPENDIX-19

Plaintiff Gilder Employment History
filed into United States District Court
under case no. SA-92-CV-0394

DATE	ACTION
09/21/81	Date of hire, Unite Assistant Trainee class 18
04/12/82	Promotion, Unit Assistant class 19
08/17/82	Promotion class Processor Trainee class 21
01/18/83	Promotion, Group Claim Processor, class 22
08/01/83	Promotion, Senior Group Claim Processor,class 23
06/03/85	Promotion, Fiekd Claim Examiner class 24
10/18/85	Verbal warning--Failing to meet performance standards.

11/12/85 Verbal warning extended--Failure to meet Performance Standards

01/09/86 Written warning--Failure to meet Performance Standards

11/11/86 Verbal warning--Failure to meet Performance Standards

03/13/87 Written warning--Failure to meet Performance Standards

04/20/87 Probation--Failure to meet Performance Standards

05/20/87 Date of Termination--unsatisfactory Performance

see appendix to rehearing en banc exhibit m

APPENDIX-20

Aetna Life Insurance

Procedural checklist for Performance/ Attendance Problems

see appendix of rehearing en banc exhibit n

DEBRA GILDER / Employee's Maxine Merryman / Supervisor

Dates	Procedures
10/18/85	(Verbal warning)--Meeting with employee privately to discuss the problem, possible solutions and time for correction. Quality--poor stat results for Aug.-Sept. average 90.84%, for Aug. 94.54, pay for Sept. 98.38% could be placed on written warning if October results are not meeting requirements level.

11/12/85 Consult with management to discuss situation steps to correct, as needed. Extended verbal warning as the Oct. stat results average 95.86, which is IMR if Nov. results are not IMR in both pay and stat she could be placed on written warning.

12/17/85 Removed from Verbal Warning

01/09/86 Written warning stating problems with specific examples outlining steps for improvement and setting sufficient time for improvement sent to employee -- Removed from warning see memo (A-21).

02/10/86 Jan. results showed much improvement with 99.92 pay and 97.62 stat (Removed from Warning).

APPENDIX-21

Aetna Progressive Discipline Checklist

Employee--DEBRA A. GILDER MAXINE MERRYMAN

Supervisor

Reasons for Progressive Discipline

Quality

Progressive Discipline

Date	Action
11/11/86	As part of on going supervision, meet with employee privately to discuss problems and possible solutions, allowing time for correction.

COMMENTS: Results for Sept. were pay 98.44.and 91.50, stat 93.82 and 94.00, Needs to have Nov. results back to IMR. (Verbal Warning issued)

12/17/86 If appropriate, Progress Reports Include:

Discussion of employee's progress.

COMMENTS: Removed from verbal warning Nov. results pay 99.50% and stat 95.99%.

see exhibit p of the appendix rehearing en banc

APPENDIX-22

AETNA LIFE AND CASUALTY

Inter Office Communication

TO: DEBRA GILDER, Field Claim Examiner

FROM: MAXINE MERRYMAN, Div. Coordinator

DATE: March 13,1987

SUBJECT: Written Warning--Performance

For the period December-Febuary, your results were 96.68% pay dollars, 91.66% statistical accuracy, and an average production of 95.8 weighted requirements for an employee in your class.

You are being placed on written warning effective today until April 13,1987. During this period you will be expected to meet the Production Requirement of 110 weighted claims per day, while attaining quality results of 95.90% pay dollars and 98.60% statistical accuracy. Your qualilty and production results

for a rolling six(6) months should then be at an acceptable level.

If at any time it is determined that you will be unable to meet these goals, you may be placed on probation before the end of this warning.

I have read and received a copy of this memo. I understand what is expected of me and how this relates to my employment and salary\ merit review.

see exhibit q of the appendix for rehearing en banc

APPENDIX-23

AETNA LIFE AND CASAULTY

TO: DEBRA GILDER, Field Claim Examiner

FROM: JOY DILLON, Supervisor

DATE: April 20,1987

SUBJECT: Probation--Performance

On November 13,1986, you were given a verbal warning for failing to meet Performance Requirements.

For the period of December through Feburary, your results again were below office standards and were placed on written warning on March 13,1987.

Your results for March were 76.72% pay, 89.55% statistical, 86.21% incidence, 96.72% coding and with an average production of 98.97% weighted claims per day.

You are being placed on probation effective April 20,1987, and are expected to attain audit results of 96% incidence and 98.7% coding while

maintaining production of at least 100% weighted claims per day.

During your probationary period you will be expected to meet the quality and production goals set forth above. If at any time it is determined that you will be unable to meet these goals, your employment may be terminated before the end of your probation period. This probation will be in effect until May 20,1987.

If you successfully meet the Terms of your probation, you will be removed from probation. However, failure to meet the Terms of your probation may result in Termination of your employment.

I have read and received a copy of this memo. I understand what is expected of me and how this relates to my employment and salary\ merit review.

see exhibit r of the appendix for rehearing en banc

APPENDIX-24

AETNA LIFE INSURANCE

Disciplinary Process:

Initiation of the Disciplinary Process will be determined by the above formula based on results during any rolling six(6) months. Whenever the overall performance formula yields a rating of less than 3(MR), the disciplinary process will begin. Additionally, FMR results in any category may result in begining the disciplinary process.

NOTE. Production Reports and Audit Selections are computerized and, as such, have a built in delay. Therefore for processors, the warning period may cover work already performed. All employees, by virtue of the fact that these standards\ requirements are published are aware of the necessary to attain the appropriate results.

Each stage of the production\ quality disciplinary process (verbal, written, probation) will be in effect for a maximum of 30 days. The disciplinary process for quality will be initiated by the fourth working day of the month; for production by the twelfth working day. Should performance deteriorate during the respective disciplinary process, the employee may be moved to the next stage, as stipulated in the warning, when the deterioration is recognized.

Removal or advancement based on overall performance.

Cumulative rolling six(6) months results will determine removal or advancement of the Disciplinary Process. If removed the individual may be subject to the next disciplinary phase if within the next rolling six(6) months period, overall performance drop below IMR.

It is recognized that the preceding are guideline. Any Deviations require documentation with Assistant Manager and manager approval.

This were filed in the District Court under the Appellant Gilder Response to the Defendant Appellee Aetna motion for Summary Judgment Exhibit W page 5 of the extended career path program guildlines.

SEE ALSO EXHIBIT S OF THE APPENDIX FOR REHEARING EN BANC

APPENDIX-25

AETNA LIFE INSURANCE

EMPLOYEE BENEFITS DIVISION

CLAIMS DEPARTMENT

P.O. BOX 28060

4402 PIEDRAS DR. WEST

SAN ANTONIO, TEXAS 78220

MAY 20,1987

DEBRA GILDER

1823 PECK

SAN ANTONIO, TEXAS 78210

Dear Debra;

On November 13,1986, you were given a verbal warning for failing to meet performance requirements.

On March 13,1987, you were placed on written warning because your performance results failed to show improvement.

On April 20,1987, you were placed on probation because your November results still failed to show improvement.

Although your April results did show improvement in pay incidence, your coding averaged 96.55% pay incidence and 98.31% for coding while production averaged 90.9% weighted claims per day.

Since you were unable to meet the Terms of your probation your employment with Aetna is Terminated effective May 20,1987. Attached is a form edtitled "Before you Leave" which explains what happens to your group insurance benefits and an "Authorization to Disclose Information" which you may sign if you wish.

You are due wage for three(3) work days, 13 vacation days, earned for 1987 five(5) severance pay.

Enclosed is your pay check for $786.93, dated May 20,1987, which represents 13 unused vacation days. The three(3) days you worked this week will be included in your Final severance check.

Your severance pay will begin May 21,1987, and will continue for five(5) weeks. Checks will be mailed to your home address.

If you have any additional questions Please feel free to contact Mollie Campbell, Personnel Coordinator at this office.

see exhibit t of the appendix for rehearing en banc

APPENDIX-26

THE CONSTITUTION OF THE UNITED STATES

Article VI

section 2

This constitution, and the Laws of the United States which shall be made in Pursurance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary not withstanding.

APPENDIX-27

THE CONSTITUTION OF THE UNITED STATES

THE FIFTH AMENDMENT

Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, Except in cases arising in the Land or Naval Forces, or in the Militia when in actual service in time of wars or public danger; nor shall any person be subject for the same offence to be twice put in Jeopardy of Life or Limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of Life, Liberty or Property, without Due Process of Law; nor shall privale property be taken for public use, without Just Compensation.

APPENDIX-28

THE CONSTITUTION OF THE UNITED STATES

THE SEVENTH AMENDMENT:

Amendment VII [1791]

In Suits at Common Law, where the value in controversy shall exceed twenty dollars, the Right of Trial by Jury shall be preserved, and no facts tried by Jury, shall be otherwise Re-examined in any court of the United States, than according to the rules of the Common Law.

APPENDIX-29

THE COMSTITUTION OF THE UNITED STATES

THE NINETH AMENDMENT:

Amendment IX [1791]

The enumeration in the constitution of certain Rights shall not be construed to Deny or disparage others Retained by the people.

APPENDIX-30

THE CONSTITUTION OF THE UNITED STATES

THE ELEVENTH AMENDMENT:

Amendment XI [1798]

The Judical power of the United States shall not be construed to extend to any Suit in Law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by citizens or subjects of any Foreign State.

APPENDIX-31

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

San Antonio Division

DEBRA A. GILDER

VS.

AETNA LIFE & CASUALTY

CASE NO. SA-92-CV-0394

Defendant, Aetna Life Insurance company's Responses to Plaintiff's request for Production of Documents and Plaintiff's First Set of Requests For Admissions

To The Honorable Judge of SAID Court;

Come now Aetna Life Insurance Company, the correct name of the Defendant in above captioned

cause and files this its Response to Plaintiff's Request for Production of documents and answers to Plaintiff's Request for admissions.

Response to Plaintiff Request for Production of Documents.

I

Request for Production No.1

ANSWER: Defendant, Aetna Life Insuance objects to Request for Production No.1 because it is unintelligible. It is unintelligible because the warning Requested by Debra Gilder and dated Feburary 10,1986, and December 17,1986, do not exist because no warning was given on such a date, but Reference were made in Debra Gilder's file on such dates to the effect that Debra Gilder was "Taken off Warning" on such dates.

STANDARDS OF PROOF

I. Disparate Treatment

A. Individual

1. Whether charging party belongs to a protected group;

2. Whether charging party was harmed by an employment decision.

3. Whether similarly situated employees were not harmed under similar circumstances;

4. Whether there was alegitimate, non-discriminatory reason for the employment decision;

5. Whether the employer's stated reasons for the employment decision was in fact pretext.